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No. .....

1641

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In The Matter of BEVERLYRIDGE COMPANY, et al., Bankrupt.

GEORGE H. OSWALD, RICHARD CASTLE,

Appellants,

vs.

JOHN BEYER, Trustee,

Appellee.

Transcript of Record

Appeal From the United States District Court for the Southern District of California, Central Division.

Los Angeles Review, Law Printers, 224 Court Street, Los Angeles, Calif.

No. .....

In the

United States
Circuit Court of Appeals

For the Ninth Circuit.

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INDEX

(Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.)

BILL OF EXCEPTIONS:

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

GEORGE DELANY BLAIR,

J. GILBERT FALL,

Citizens National Bank Building,

Los Angeles, California.

For Appellee:

LORRIN ANDREWS,

756 South Broadway,

Los Angeles, California.

CITATION.

UNITED STATES OF AMERICA—SS.

To JOHN BEYER, Trustee of the BEVERLYRIDGE COMPANY, a co-partnership, Bankrupt,

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 14th day of June, A. D. 1929, pursuant to the appeal duly obtained and filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause wherein you as trustee of the Beverlyridge Company, a co-partnership, Bankrupt, are appellee and Richard Castle, Claimant, is appellant, and you are required to show cause, if any there be, why the order and decree in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD J. HENNING, United States District Judge for the Southern District of California, this 17th day of May, A. D. 1929, and of the Independence of the United States, the one hundred and fifty-third year.

EDWARD J. HENNING,
U. S. District Judge for the Southern District of California.

(Endorsed): Filed May 29 1929 at ..... min. past 10 o'clock a. m. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy.

CITATION

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EDWARD J. HENNING,
U. S. District Judge for the
Southern District of California.

(Endorsed): Filed May 29 1929 at ..... min. past 10 o'clock a. m. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

IN THE MATTER OF BEVERLYRIDGE COMPANY, ET AL., Bankrupt.

No. .....

PROOF OF UNSECURED DEBT.

At Los Angeles, California, in said Southern District of California, Southern Division, on the 16th day of November, A. D. 1926, came Richard Castle of Los Angeles County, State of California, in said District of California, Southern Division, and made oath and says that the person in the above matter against whom a petition for adjudication of Bankruptcy has been filed, was at and before the filing of said petition and still is, justly and truly indebted to said deponent in the sum of twenty-five thousand eight hundred and eighty ($25,880) dollars; and that the consideration of said debt is as follows:

That on or about the 5th day of November, 1925, the said bankrupts entered into a contract with the said Richard Castle, a copy of which is attached hereto and made a part hereof and marked Exhibit "A."

That pursuant to said contract, the said Richard Castle agreed to obtain from one Geo. H. Oswald or Oswald Brothers, a certain contract wherein the said Oswald would agree to make certain improvements on certain real property known as Beverlyridge, consisting of about one hundred (100) acres.

That thereafter and on or about the 19th day of No-

vember, 1925, the said Richard Castle induced the said Geo. H. Oswald to enter into a contract with the said bankrupts wherein and whereby the said Oswald agreed to make certain improvements on said real property, that in consideration for obtaining said contract, the said bankrupts agreed to pay said Richard Castle twenty-five thousand ($25,000) dollars, which sum was to be paid in lots which were to be deeded to said Richard Castle from said property known as Beverlyridge, and on or about the 14th day of December, 1925, in order to carry out the said agreement marked Exhibit "A," the said bankrupts entered into an agreement to convey to the said Richard Castle certain property in the said Beverlyridge, that a copy of said agreement is attached hereto and made a part hereof as if fully set forth and marked Exhibit "B."

That the said deponent is informed and believes and upon that ground states that the said bankrupts placed a trust deed upon said Beverlyridge as security for a note which said trust deed and note were held by the Hogan Finance Company, a corporation, that said trust deed was a prior encumbrance to the contracts herein marked Exhibit "A" and "B" and that the said deponent is informed and believes and upon that ground states that the said bankrupts have defaulted in the payment of said note and that the said Hogan Finance Company have foreclosed under said trust deed, and any and all rights held by the said bankrupts in and to said property known as Beverlyridge has been lost by reason of said Hogan Finance Company foreclosing said trust deed, and that the said deponent has lost any and all right or interest he may have had in and to said property mentioned in

Exhibits "A" and "B" herein, by reason of said foreclosure.

That the said bankrupts agreed to protect the said interest of said deponent on said property and agreed to pay said note and trust deed held by said Hogan Finance Company and that by reason of said failure to pay said note and trust deed thereby causing said deponent to loose his rights and interest in said property and that by reason of said loss, the said deponent was damaged in the sum of twenty-five thousand ($25,000) dollars.

That during the month of November, 1925, and prior to the said bankruptcy proceedings herein, the said deponent advanced to the said bankrupts the sum of eight hundred and eighty ($880) dollars, said sum being used by the said bankrupts for the purpose of paying office help and expenses.

That no part of said debt has been paid, and no note has been received for said indebtedness, nor for any part thereof, nor has any judgment been rendered thereon, that there are no setoffs or counter-claims to the same and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatsoever.

RICHARD CASTLE
Creditor.

Subscribed and sworn to before me this 16th day of November, 1926.
(Seal)

PEARL B. SOMERS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires May 4, 1927.

To George D. Blair,
711 Security Bldg.,
Los Angeles, Calif.

I, Richard Castle the claimant mentioned in the foregoing claim, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the Bankrupt aforesaid at a Court of Bankruptcy, *wher*-ever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the Court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof, may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to Bankruptcy; and in the choice of trustee or trustees of the estate of the said Bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting of meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

RICHARD CASTLE.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed my seal the 16th day of November, A. D. 1926.

Signed, Sealed and Delivered in the Presence of

RICHARD CASTLE (seal).

Acknowledged before me, this 16 day of November, 1926.

(Seal) PEARL B. SOMERS,

Notary Public in and for said County and State.

My commission expires May 4, 1927.

November 5, 1925.

Mr. Richard Castle
9150 West Pico
Los Angeles

Dear Sir:

In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed, we shall deed to you $25,000. worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500 and $1600.

Yours very truly,
Beverlyridge Company,
(Signed) Charles Stone,
Managing Director

(Exhibit "A")

AGREEMENT TO CONVEY REAL ESTATE.

THIS AGREEMENT, made this 14th day of December, 1925, by and between CHARLES STONE, as trustee under a Deed and Declaration of Trust dated April 18, 1925, and recorded in the office of the Recorder of Los Angeles County, California, on the 21st day of May,

1925, in Book 4002 of Miscellaneous Records at page 108, party of the first part, and Richard Castle of Los Angeles, California, party of the second part.

Party of the first part, in consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property in the City of Los Angeles, County of Los Angeles, State of California, to-wit:

That certain piece or parcel of land situated in Los Angeles County, State of California, being in the Northwest ¼ of the Southeast ¼ of Section 11, T. 1 S., R. 15 W., S. B. B. & M. and particularly described as follows:

Beginning at the Northwesterly corner of Lot 73 of Tract No. 8080 as shown on that certain map recorded in Book 112, at pages 9 et seq. of Maps, Records of Los Angeles County, California, and running thence Northwesterly along the arc of a circle curving to the left, having a radius of 486 feet, a distance of 20.20 feet, to a point, thence N. 13° 58′ W., a distance of 96.81 feet to a point, thence along the arc of a circle curving to the right having a radius of 123.835 feet, a distance of 83.94 feet to a point, thence 5.87° 57′ 18″ E., a distance of 97.244 feet to a point, thence 5.8° 53′ 03″ E., a distance of 64.772 feet to a point, thence along the arc of a circle curving to the right and having a radius of 15 feet, a distance of 13.49 feet to a point, thence along the arc of a circle curving to the left and having a radius of 30 feet, a distance of 64.366 feet to a point, thence 5.0° 06′ 48″ W., a distance of 108.923 feet to a point, thence along the arc of a circle curving

to the right and having a radius of 15 feet, a distance of 28.914 feet to a point of the northerly line of said Lot 73 of said Tract 8080, thence N. 69° 26′ 40″ W. along said northerly line of said Lot 73, a distance of 58.505 feet to a point, thence N. 34° 28′ 40″ W. along the boundary line of said Lot 73, a distance of 44.41 feet to the point of beginning.
(Exhibit "B")

Also

That certain piece or parcel of land situated in Los Angeles County, State of California, being in the Northwest ¼ of the Southeast ¼ of Section 11, T. 1 S., R. 15 W., S. B. B. & M. and particularly described as follows:

Beginning at the Northeasterly corner of Lot No. 74 of Tract No. 8080, as shown on that certain map recorded in Book 112, at pages 9 et seq. of Maps, Records of Los Angeles County, California, and running thence N. 67° 36′ W. along the northerly line of said Lot 74, a distance of 67.21 feet to a point, thence along the arc of a circle curving to the right and having a radius of 30 feet, a distance of 35.455 feet to a point, thence N. 0° 06′ 48″ E., a distance of 114.309 feet to a point, thence along the arc of a circle curving to the left and having a radius of 30 feet, a distance of 13.102 feet, thence 534° 30′ 16″ E., a distance of 114.945 feet to a point, on the westerly line of Altridge Drive as shown on said map of said Tract 8080, thence southeasterly along said westerly line of Altridge Drive to the point of beginning.

It is expressly understood and agreed however, by

both parties hereto that the deed to be executed by party of the first part pursuant hereto shall contain restrictions as nearly identical as may be with restrictions (1), (2), (3) and (5) and also restrictions similar to restriction No. (4) as contained in all grant deeds heretofore executed by party of the first part conveying any lot or lots in Tract 8080 in the City of Los Angeles, as shown on Map thereof recorded in Book ..... of Maps, Page ....., in the office of the Recorder of Los Angeles County aforesaid.

It is further understood and agreed that as soon as party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the Tract which contains the above described premises, party of the second part shall quitclaim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.

It is further understood and agreed that at the time of such conveyance party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain Deeds of Trust, each of which is now a blanket lien on the within described premises and other property.

In Witness Whereof, the parties have hereunto set

their hands the day and year first above written.

(Signed) Charles Stone Trustee,
Grantor.
Richard Castle,
Grantee.

State of California,
County of Los Angeles—ss.

Be it remembered that on this 14th day of December, 1925, before me, Gertrude M. Hartman, a notary public in and for said County and State, personally appeared Charles Stone and Richard Castle, each personally known to me and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I hereunto set my hand official seal the day and year first above written.

(Signed) Gertrude M. Hartman,
Notary Public in and for the County of Los
(Notarial Seal) Angeles, State of California.
My Commission expires June 16, 1929.

[TITLE OF COURT AND CAUSE.]

No. 8547-H

OBJECTIONS TO THE CLAIM OF RICHARD CASTLE.

John D. Beyer is the duly appointed, qualified and acting Trustee of the above named bankrupt, and as such, objects to the allowance of the claim of RICHARD

CASTLE for Twenty-five Thousand, Eight Hundred Eighty and no/100 ($25,880.00) heretofore filed but not yet allowed herein, upon the following grounds, to wit:

That the books of the Beverlyridge Company do not show that this amount is due.

JOHN D. BEYER,
Trustee

County of Los Angeles—ss.
STATE OF CALIFORNIA

John D. Beyer, being first duly sworn on oath deposes and says:

That the statements contained in the foregoing Objections to Claims are true, according to the best of his knowledge, information and belief.

JOHN D. BEYER
Trustee

Subscribed and sworn to before me, this 6 day of April, 1927.

(SEAL) LOUISE HUDSON
Notary Public in and for the State of California, County of Los Angeles.

(Endorsed): Filed Apr 5 1927 at.....Min. past 4 o'clock P. M. Earl E. Moss, Referee, Louise Hudson, Clerk

(Endorsed): Filed Jan 9 1929 at.....min. past 4 o'clock P. M. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy

[TITLE OF COURT AND CAUSE.]

No. .....

PROOF OF UNSECURED DEBT.

At Los Angeles, California, in said Southern District of California, Southern Division, on the 8th day of November A. D. 1926, came Geo. H. Oswald of Los Angeles County of California, in said district of California, Southern Division, and made oath and says that the persons in the above matter against whom a petition for adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of one hundred fifty-two thousand and nine hundred seventy-nine ($152,979) dollars; and that the consideration of said debt is as follows:

That on or about the 19th day of November A. D. 1925, the said bankrupts entered into a contract with the said Geo. H. Oswald, a copy of which is attached hereto and made a part hereof and marked Exhibit "A."

That pursuant to said contract, the said Geo. H. Oswald agreed to improve the property described in said Exhibit "A" in the manner therein set forth and at the price therein agreed upon.

That as a condition precedent to the commencing of said work the said bankrupts were required to furnish as provided in paragraph 2. of said contract marked Exhibit "A," plans and profiles of all of the work mentioned in said contract and to take out permits to do the said work. That although on numerous occasions after the said 19th day of November, 1926, and prior to the filing of the petition in bankruptcy in the above

matter, said Geo. H. Oswald requested that the said bankrupts furnish the said plans and profiles and permits to do said work, the said bankrupts failed to furnish the same, that as a result of the said bankrupts failure to furnish said plans and profiles and necessary permits permitting said work to be done, that the said Geo. H. Oswald was prevented from doing any of the work mentioned in said contract and by reason of the failure of said bankrupts to complete said contract, as provided therein, the said Geo. H. Oswald was damaged by reason of failure to make the following profits at the prices set forth in said contract.

The damage sustained by said Geo. H. Oswald, in the order in which said prices for doing said work are set forth in paragraph 4. of said contract are as follows:

(a) Profit on 5" cement concrete paving, set forth in paragraph "4a" of said contract, sixty-six thousand ($66,000) dollars.

(b) Profit on item "4b", set forth in said contract, seven thousand one hundred seventy-six ($7,176) dollars.

(c) Profit on item "4c", set forth in said contract, sixty thousand ($60,000) dollars.

(d) Profit on item "4i", set forth in said contract, nineteen thousand five hundred ($19,500) dollars.

And in addition to the above items the said Geo. H. Oswald, prior to the said bankruptcy proceedings herein, advanced to the said bankrupts the sum of three hundred two and 43/100 ($302.43) dollars on the 8th day of December, 1925, said sum being used by said bankrupts to pay their telephone bill.

The total sums due Geo. H. Oswald from said bank-

rupts are one hundred fifty-two thousand nine hundred seventy-eight and 43/100 ($152,978.43) dollars.

That the security mentioned in said contract, this claimant is informed and believes has been exhausted by reason of the fact that the Hogan Finance Company who held a note secured by a Trust Deed covering said property foreclosed under said Trust Deed and sold said security thereby defeating any security held by the said Geo. H. Oswald.

That the said Geo. H. Oswald would have completed said contract had the said bankrupts performed the things necessary to permit said Geo. H. Oswald to do said work.

That no part of said indebtedness has been paid and no note has been received for said indebtedness, nor for any part thereof, nor has any judgment been rendered thereon, that there are no setoffs or counter-claims to the same, and deponent has not nor has any person by his order, or to his knowledge or belief, for his use, had nor received any manner of security for said debt whatever, other than mentioned in said contract marked Exhibit "A" which has been defeated as hereinabove set forth.

GEO. H. OSWALD,
Creditor.

Subscribed and sworn to before me this 8th day of November, 1926.

(Seal) Marguerite L. Wilbur,
Notary Public in and for the County of Los Angeles, State of California.

To Geo. D. Blair—711 Security Bldg.
Los Angeles, Calif.

I, Geo. H. Oswald the claimant mentioned in the foregoing claim, do hereby authorize you, or any of you, to attend the meeting or meetings of creditors of the Bankrupt aforesaid at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other place and time as may be appointed by the Court for holding such meeting or meetings, or at which such meeting or meetings or any adjournment or adjournments thereof, may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to Bankruptcy; and in the choice of trustee or trustees of the estate of the said Bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said Bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In Witness Whereof, I have hereunto signed my name and affixed my seal the 23 day of November A. D. 1926.

Signed, Sealed and Delivered in the Presence of

Geo. H. Oswald (Seal)

ACKNOWLEDGED before me, this 23rd day of November, 1926.

(Seal) HOLMES ELLIS,

Notary Public in and for said County and State.

THIS AGREEMENT made and entered into this 19 day of November, A. D., 1925, by and between Charles Stone, Trustee, Charles Stone and Clara F. Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and W. R. Norcross, an unmarried man, parties of the first part, and George H. Oswald, party of the second part: WITNESSETH:

1. That for and in consideration of the covenants hereinafter mentioned, the parties of the first part hereby agree to improve the streets and property described as follows, to-wit:

Property now Subdivided

Tract No. 8080, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 112, pages 9 et seq. of Maps, in the office of the County Recorder of said County.

Property not Subdivided.

The North West quarter of the North East quarter of Section 11, Township 1 South, Range 15 West, S. B. M., in the City of Los Angeles, County of Los Angeles, State of California.

ALSO those portions of the South West quarter of the North East quarter and of the North West quarter of the South East quarter of said Section 11, which lie North of the North line of Tract No. 8080, as per map

recorded in Book 112 pages 9 set seq. of Maps, in the office of the County Recorder of said County;

And being approximately 111 acres.

All of said property being situated in the City of Los Angeles, County of Los Angeles, State of California; said improvements to be as follows:

(a) Streets to be graded and paved with 5 inch cement concrete paving.

(b) Light cement concrete curbing, known as Class B.

(c) 8 inch main sewers and 6 inch house connections.

(d) Man holes.

(e) Flush tanks.

(f) Gas and water system, to be piped to each lot.

(g) Electric conduit system, Units 2, 3, and 4, but not Unit 1, except house connections to one foot inside property line.

(h) Excavation, both dirt and rock.

(i) Trimming banks.

2. All of the above work to be under the inspection of the City of Los Angeles, according to the plans and profiles to be furnished by the parties of the first part, and approved by the City of Los Angeles, Permits for the above work to be taken out by the parties of the first part, and the costs of said permits to be paid by the parties of the first part.

3. Party of the second part hereby agrees to begin work on the above improvements within ten days from date and to complete the same within one year from date, unless said party of the second part be obstructed or delayed in the commencement, prosecution or completion

of the work by the act, neglect, delay or default of the parties of the first part, or by strikes, delay of common carriers, the abandonment of the work by employees or the default of the parties of the first part, or by any damage which may happen by fire, lightning, earthquake, or cyclone, or by inclement weather, or by other causes beyond the control of the party of the second part, including inability to procure delivery of materials providing the same shall have been purchased a reasonable time before same are required for use in the said work.

4. In consideration of the above, parties of the first part hereby agree to pay to the party of the second part for said improvements at the following unit prices.

(a) Five (5) inch cement concrete paving, 25 cents per square foot.

(b) Light cement concrete curbing known as Class B per lineal foot 65 cents.

(c) Eight (8) inch main sewers and Six (6) inch house connections, where trench can be dug with trenching machine, and trench not over 8 feet in depth, $2.50 per lineal foot; where trench over 8 feet, when trench can be dug with trenching machine, $2.50 per lineal foot, plus 25 cents per lineal foot for each foot in depth, or part thereof over 8 feet. If digging is in substance in which trenching machine can not be used, $2.50 per lineal foot, plus the cost of digging trench in such substance plus 25 per cent. of the cost of digging said trench in such substance.

(d) Man holes, not over 8 feet in depth, when dug in soft earth in which trenching machine might be used, each $65.00. If hard earth or substance in which trenching machine can not be used, each $65.00, plus cost of

excavation in such earth or substance, plus 25 per cent of the cost of such excavation.

(e) Flush tanks, not ever 8 feet in depth, when dug in soft earth in which trenching machine might be used, each $100.00. If hard earth or substance in which trenching machine can not be used, each $100.00, plus the cost of excavation of such earth or substance, plus 25 per cent. of the cost of such excavation.

(f) Gas, estimate to be furnished by Los Angeles Gas & Electric Co. plus 25 per cent.

(g) Water, same cost as estimate to be furnished by Los Angeles Water Department, plus 25 per cent.

(h) Electric Conduit system, complete, to be hereafter agreed to by parties by letter.

(i) Dirt excavation, 65 cents per cubic yard, where haul is less than 300 feet. For overhaul 5 cents for each hundred feet or any part thereof.

(j) Rock excavation, $2.00 per cubic yard, not more than 300 foot haul. For overhaul, 10 cents per hundred feet or any part thereof.

(k) Trimming banks, to be hereafter agreed upon by parties by letter.

(l) For finishing grading, excavation, or embankments, preparatory to pouring concrete, where said party of the first part has heretofore graded, excavated, or embanked, cost plus 25 per cent. plus the amounts set forth in Subdivision (i) of this paragraph.

(m) Watering fills, cost plus 25 per cent.

(n) All water used shall be furnished and paid for by the parties of the first part.

It is agreed that overhaul shall be computed by taking the product of the number of cubic yards of material

remaining in any cut after proper deduction has been made for material placed within the free haul distance, by the distance such material is hauled, less 300 feet. The distance such material is hauled will be taken as the distance between the center of volume of such remaining cut and the center of volume of the corresponding fill.

It is further agreed in addition to the above payments, that said party of the second part shall receive all refunds for gas and water and lighting system.

5. Said first parties represent that they are the owners of said property and that the only encumbrances and claims against said property are as follows:

(a) Trust deed in the sum of $220,000.00 interest at 8% per annum, payable quarterly, due January 19, 1926.

(b) Trust deed in the sum of $320,000.00 with interest at 8% per annum, payable quarterly, due September, 1927.

(c) Mechanic's liens and attachments not over $30,000.00, which said first parties agree to remove within 90 days from date.

(d) Approximately seventy-three (73) lots or about seventeen (17) acres of said property have been sold for the sum of approximately $612,690.00, and that there is due said first parties by reason of said sales approximately $407,725.00, part of which is evidenced by trust deeds of which $201,333.00 has been assigned or pledged as security for the payment of $92,750.00.

Said parties of the first part further represent that they own all of said described land, except as noted in Subdivision (d) of this article, and that each of the Trust Deeds described in Subdivision (a) and (b) contain a release price which together permit them to obtain clear

title to any portion or part of said property, by the payment of a sum equal to $6190.00 per acre.

6. Said parties of the first part agree to use all sums derived from the payment of said contracts mentioned in Subdivision (d) of Paragraph 5 for the purpose of paying the interest and the trust deeds mentioned in Subdivisions (a) and (b) of Paragraph 5.

7. It is understood and agreed by and between the parties hereto that unless the parties of the first part within ten days from the date hereof obtain an agreement in writing whereby the trust deed mentioned in Subdivision (a) of Paragraph 5 is extended for a period of six months at the same rate of interest the said party of the second part may at his option declare this contract null and void; however, he shall be entitled to collect for any and all work done.

8. It is further agreed between the parties hereto that in the event said property or any portion thereof is sold under conditional sales contracts, all sums received by said parties of the first part, after deducting 21% of total sales price, shall be paid to and are hereby assigned to said party of the second part, until such sums shall pay said party of the second part for all work and improvements, provided, however, that said parties of the first part may retain from the last payments made under such contract of sale a sum equal to the release price of such property sold, which sums shall be used only to obtain the release of said property.

9. It is further agreed that in the event said property or any portion thereof shall be sold and title transferred, said parties of the first part shall and hereby agree to pay from the first money received, the release price of said

property sold, and thereafter not to retain more than 21% of the sale price of said property, and thereafter any and all sums received from the sale of said property shall be paid immediately to said party of the second part, until such sums shall pay said party of the second part for all work and improvements, and said sums are hereby transferred and assigned to said party of the second part, and when said sums have been paid to said party of the second part, or the trust deed, or mortgage, securing the total purchase price of said property sold have been assigned to said party of the second part as security for the payment of said improvements, said party of the second part agrees, upon written demand, to release all claims he may have against such property so that clear title may be passed, subject to such Trust Deeds or mortgages assigned to him as security, however, nothing in this paragraph shall be construed as a waiver of the terms and conditions of Paragraphs 10, 11, and 12 hereof.

10. Said first parties further agree not to sell or contract for the sale of said property or any part thereof at a price less than enough to pay the proportionate cost of all encumbrances against said property plus 21 per cent. of the total sale price, and in addition thereto an amount equal to two and one-half times the proportionate cost of all improvements, whether completed or uncompleted, and no sale shall be made where title is conveyed and a trust deed is accepted as security for the purchase price unless at least 33 1/3 per cent. of the total purchase price is paid at the time title is conveyed, and such trust deeds shall be paid within three years in installments of not less than one-third each year and shall bear interest at

not less than 7 per cent. per annum, and no sale on conditional contract shall be made unless 25 per cent. of the purchase price is paid at the time the contract is entered into and the balance shall bear interest at not less than 7 per cent. per annum, and not less than one-third of such balance shall be paid each year.

11. Said parties of the first part further agree in the event said sums paid to said party, as hereinbefore provided, do not amount to one-half of the total cost of all work and improvements completed at the end of six months from date hereof, to immediately pay to said party of the second part the difference between the amount paid and one-half of the total cost of completed work and improvements.

12. Said parties of the first part further agree, within one year from the date hereof, to pay said party of the second part for all work and improvements completed at the above mentioned unit cost basis, and in the event all of said work and improvements are not completed within one year from date, to pay for same at the time of completion.

13. In order to secure the payment of all sums herein provided and faithful performance of all of the terms, covenants and conditions herein set forth upon the part of the said parties of the first part, the said parties of the first part do hereby transfer and assign to the said party of the second part, all of their right, title and interest in and to the within mentioned and described real property.

14. Said party of the second part further agrees that when the sums provided in Paragraphs 8, 11 and 12 have been received by him, he will, upon written demand, re-

lease any and all claims or liens he may have against that portion of said land, provided, however, nothing in this paragraph shall be construed as a waiver of the terms and conditions provided in paragraph 9 hereof.

15. Parties of the first part agree during the continuance of this agreement to appear in and defend any action or proceeding purporting to effect any of the herein mentioned property or the security or the interest of the party of the second part, and to pay all costs and expenses, including cost of evidence of trial and attorney's fees in a reasonable sum, in any action or proceeding in which said second party may appear, to protect said property or the security or interest of said party of the second part, including the enforcement of his rights under this contract.

16. Acceptance by said party of the second part of any sum in payment of any indebtedness after the date when the same is due, shall not constitute a waiver of the right either to require prompt payment when due of all other sums, or to declare default as herein provided for failure so to pay, or to perform any of the covenants or conditions contained herein.

17. Said parties of the first part hereby agree to deliver monthly to the said party of the second part at his place of business, 366 East 58th Street, in the City of Los Angeles, California, a written statement of a certified public accountant showing:

(a) Total property sold and description and size of same.

(b) To whom sold.

(c) Selling price, amount paid and balance to be paid on each purchase.

18. Should breach or default be made by said parties of the first part in payment of any indebtedness or any performance of any obligation, covenant, promise, or agreement herein mentioned, then said party of the second part may at his option declare all sums due for all work completed, and in addition thereto collect such damages as he may sustain, and may refuse to continue the work of installing and furnishing improvements for the rest of said property, or said party of the second part may at his option take possession of said property, and make such improvements as he deems best and sell said property or any part thereof, and the proceeds from the sale of said property shall be paid as follows:

First. Payment of encumbrances against that portion of the land sold.

Second. Payment of total cost of improvements.

Third. Total cost of selling said property, and any remaining sums thereafter shall be divided equally between the parties thereto.

In Witness Whereof, The parties have hereto set their hands and seals the day and year first above written.

Charles Stone, *Trustee*
Charles Stone
F. A. Arbuckle by Charles Stone *Atty. in fact*
John M. Pratt by Charles Stone *Atty. in fact*
W. I. Norcross by Charles Stone *Atty. in fact*
James Westervelt

.....
.....
.....
.....

Parties of the First Part.

Geo. H. Oswald.

Party of the Second Part.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

On this 19th day of November, in the year 1925, A. D., before me, Anne Morgan a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Charles Stone and Charles Stone Trustee, personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County the day and year in this certificate first above written.

ANNE MORGAN,
Notary Public in and for Los Angeles County, State of California.

(NOTARIAL SEAL)

My Commission expires March 3, 1929.

[TITLE OF COURT AND CAUSE.]

No. 8547-H.

OBJECTIONS TO THE CLAIM OF GEORGE OSWALD.

John D. Beyer is the duly appointed, qualified and acting Trustee of the above named bankrupt, and as such, objects to the allowance of the claim of GEORGE OSWALD for One Hundred Fifty Two Thousand Nine Hundred Seventy-eight and 43/100 ($152,978.43) Dol-

lars heretofore filed but not yet allowed herein, upon the following grounds, to wit:

That the books of the Beverlyridge Company do not show that this amount is due.

JOHN D. BEYER
Trustee

STATE OF CALIFORNIA
County of Los Angeles—ss.

John D. Beyer, being first duly sworn on oath deposes and says: That the statements contained in the foregoing Objections to Claims are true, according to the best of his knowledge, information and belief.

JOHN D. BEYER
Trustee

Subscribed and sworn to before me this 6 day of April, 1927.

(SEAL) LOUISE HUDSON
Notary Public in and for the State of California, County of Los Angeles.

(Endorsed): Filed Apr 5 1927 at.....Min. past 4 o'clock, P.M. Earl E. Moss, Referee, Louise Hudson, Clerk.

(Endorsed): Filed Jan 9 1929 at.....min. past 4 P. M. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW.

To the Honorable, the Judges of the United States District Court, in and for the Southern District of California, Southern Division:

I, Earl E. Moss, Referee in Bankruptcy, to whom the above entitled proceedings were referred, do hereby certify.

That in the course of the proceedings *on* Order was made and entered on the 6th day of December, 1928, as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In the Matter of	) No. 8547-H (Claim of George Oswald)
BEVERYRIDGE COMPANY,	)
Bankrupt.	) FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter coming on regularly to be heard before me on the 14th day of November, 1928, John D. Beyer, Trustee for the Bankrupt herein, appearing to contest this claim, and Lorrin Andrews, appearing as his attorney, and George Oswald appearing for his claim, and George D. Blair as attorney representing said claimant, and the Court having heard the evidence produced by the claimant and by the Trustee, and having heard argument of council, and the Trustee having admitted that the sum of Three Hundred, Two and 43/100 Dollars

($302.43) advanced by claimant, George Oswald, has been loaned to the Beverlyridge Company, now bankrupt, and was a just and lawful claim against said bankrupt, and having contested the balance of the claim herein, this Court finds as follows:

FINDINGS OF FACT.

I.

That on the 16th day of June, 1926, an involuntary petition in bankruptcy was filed against the Beverlyridge Company, the bankrupt herein, in the United States District Court, in and for the Southern District of California, Southern Division.

II.

That on the 9th day of July, 1926, the said United States District Court, in and for the Southern District of California, Southern Division, adjudged the said Beverlyridge Company a Bankrupt.

III.

That on the 9th day of August, 1926, John D. Beyer was elected Trustee of said Bankrupt estate, and ever since said time has been and now is the Trustee of said Bankrupt estate.

IV.

The Court finds that on or about the 19th day of November, 1925, a contract was drawn, the parties to which were as follows: Charles Stone, Trustee, Charles Stone and Clara F. Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and W. I. Norcross, an unmarried man, being the parties of the first part, and claimant,

George H. Oswald, being party of the second part. That said agreement is filed with the records of the case and known as claimant's Exhibit 3. That the agreement was signed by Charles Stone, Trustee, Charles Stone, F. A. Arbuckle, by Charles Stone, attorney in Fact, John M. Pratt, by Charles Stone, Attorney in Fact, W. I. Norcross, by Charles Stone, Attorney in Fact, and James Westervelt, as parties of the first part, and George H. Oswald, as party of the second part. Said contract is filed as an exhibit in this case and marked claimant's Exhibit 3.

V.

The Court finds from the evidence that all of the parties of the first part, except W. I. Norcross, were, at the time the agreement was made and of its execution, married men.

VI.

The Court finds that the interest of Charles Stone in the property mentioned in said agreement was a community interest in which his wife shares, as community property.

VII.

The Court finds that F. A. Arbuckle, John M. Pratt and W. I. Norcross, by a certain power of attorney filed with a trust executed in the matter, authorized Charles Stone to execute agreements of the character of the agreement entered into in claimant's Exhibit 3, upon their behalf.

VIII.

The Court finds that there is no evidence empowering Charles Stone to sign the agreement on behalf of the wives of the various parties, nor did he so sign, nor is

there any evidence that he claimed to represent said wives.

IX.

The Court finds that Clara F. Stone was the wife of Charles Stone at the time of the execution of the agreement, and at the time the real property was acquired by her husband, and that she never executed the agreement, marked claimant's Exhibit 3.

X.

The Court finds that on the 31st day of December, 1925, the claimant's, George Oswalds's, attorney wrote Mr. Stone as follows:

> "Mr. George Oswald has requested that I communicate with you in regard to the following matters:
>
> If you have secured the signatures of the parties of the first part to your contract with George H. Oswald will you kindly forward the same to me.
>
> Will you also kindly forward the plans and profiles, and obtain the permits necessary to do the work and forward copies of the same to me, so that I can immediately take the matter up with Mr. Oswald."

XI.

The Court finds that on January 5, 1926, Charles Stone wrote George D. Blair, the claimant's attorney, as follows:

> "Your letter of Dec. 31st with reference to the Oswald improvement contract, received.
>
> We have obtained the signatures of all of the parties to the contract with the exception of one, which will necessitate a trip to Santa Monica on the part of the writer and this will be done at the first possible moment.
>
> The contract which we are to deliver to you will supplant the original contract which was signed by

the writer under a trust agreement and power of attorney for all the partners of the Beverly-Ridge Company. . . ."

XII.

The Court finds that on January 23, 1926, George D. Blair, attorney for the claimant, George Oswald, wrote the Beverlyridge Estate as follows:

"On December 21st I wrote you and inquired if you had secured the signature of the parties of the first part to your contract with George H. Oswald. A few days later, I saw you at Mr. Castle's and you stated that you expected to have all the signatures within a day or two. As yet, I have not received the contract.

Mr. Oswald has informed me that the plans and profiles and necessary permits to do the work have not been forwarded to him.

I would like to call your attention to the fact that Mr. Oswald is contemplating the undertaking of other large contracts in the near future, and as a result would like to know if the above matters have been taken care of, and if not when they will be. Mr. Oswald feels that if this matters is not taken care of within the next few days, he will have to refuse to accept the contract."

XIII.

The Court finds that the contract, marked claimant's Exhibit 3, and dated the 19th day of November, 1925, never became effective because of the absence of the signatures of all of its parties, and the claimant, George Oswald did not consent to the acceptance of the contract without the signature of all of the parties named herein, and did in fact refuse to consider it in force and proceed with the work.

XIV.

The Court finds that George Oswald, claimant never

did any work under said contract dated the 19th day of November, 1925, and marked claimant's Exhibit 3.

XV.

The Court finds that George Oswald is entitled to Three Hundred, Two and 43/100 Dollars ($302.43), which he loaned said bankrupt on the 8th day of December, 1925, to enable the bankrupt to pay its telephone bill.

CONCLUSIONS OF LAW.

(1) That George Oswald is entitled to the sum of Three Hundred, Two and 43/100 Dollars ($302.43) from said bankrupt, being money loaned by him to said bankrupt to enable them to pay their telephone bill.

(2) That George Oswald is entitled to no damages from said Bankrupt.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED, That George Oswald, is entitled to the sum of Three Hundred, Two and 43/100 ($302.43) Dollars from said Bankrupt.

Dated this 6th day of December, 1928.

EARL E. MOSS,
Referee in Bankruptcy."

At the time of the decision in this matter an opinion was rendered herein and the reasons for the decision were set forth. The said opinion, to which the Court's attention is respectfully directed is as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In the Matter af	)
	) OPINION ON CLAIMS
BEVERLYRIDGE COMPANY,	) OF RICHARD CASTLE
	) AND GEORGE OSWALD.
Bankrupt.	)

Appearances:

Lorrin Andrews, Esq. representing the Trustee.

George DeLany Blair, Esq. representing the Claimants.

On November 5th, 1925, Charles Stone, as the managing director of the bankrupt wrote the claimant Richard Castle stating:

> "In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed, we shall deed to you $25,000 worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500. and $1600."

On December 14th, 1925, the bankrupt, by Charles Stone as trustee, executed a document, the original of which has been filed herein as claimant's Exhibit 1. This document, after identifying the parties, proceeds as follows:

> "Party of the first part, in consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property" etc.

Thereafter a certain tract of land stipulated to con-

tain 31,850 square feet in the Beverlyridge Tract was described. The document ends with the two following provisions:

> "It is further understood and agreed that as soon as party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the Tract which contains the above described premises, party of the second part shall quit claim and reconvey said premises by the same description to party of the first part and party of the first part shall immediaely thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.
>
> It is further understood and agreed that at the time of such conveyance party of the second part shall pay and discharge the full release price necessary to secure partial re-conveyance of said lots by the trustee under two certain Deeds of Trust, each of which is now a blanket lien on the within described premises and other property."

Claimant Richard Castle testified that the plat that was shown him divided the piece of property described by metes and bounds in the agreement into three lots. At no time did he offer to pay or tender to anyone the release price of either $1500 or $1600 per lot. Approximately five months after the execution of the so-called agreement to convey (Claimant's Exhibit 1) a trust deed which was in existence on the property at the time of the execution of the letter of November 5th (Claimant's Exhibit 2) and the agreement of December 14th, was foreclosed, thereby eliminating any claims that this claimant might have in the real property. This claimant at all times had knowledge of the financial condition of

the bankrupt, and in fact part of his claim includes the sum of $880.00 which he loaned to the bankrupt to pay salaries. He also knew of the existence of the encumbrances on the real property of the bankrupt.

The trustee contends first that there was no consideration for the agreement of December 14th, 1925, agreeing to convey the real property to the bankrupt, by reason of the fact that first, the services purported to have been performed by the claimant in securing the execution by George H. Oswald of an agreement with the bankrupt for the making of certain improvements on its real property, were not complete, because of the fact that all the members of the bankrupt copartnership, and their wives, the property being community real property, did not sign the agreement with Oswald. Claimant however proved that Oswald executed the agreement yet it is unquestionably true that in the absence of its execution by all of the parties thereto he could consider it void as to himself, and in fact did so treat it later. Eliminating from consideration the question of whether or not the form of agreement was satisfactory to all the members of the bankrupt, not having been signed by all of them and some of them not being present as witnesses to testify concerning its contents, it was signed by Oswald and some of the bankrupts. Under a trust agreement executed by the various members of the bankrupt firm, Charles Stone was appointed trustee with authority to make certain contracts upon the bankrupt's behalf. It was urged that the bankrupt or its trustee can not take advantage of the failure of some of its members to sign the agreement after having authorized its trustee to perform certain acts upon its part, still the authorization was not com-

plete because it concerned community real property and the trust agreement was itself not signed by the wives of all the parties.

There are, however, two other more important questions, either of which require the disallowance of this claim. It will be noted that the letter of November 5th contains the clause, "We herewith beg to state that when this deal is completed." The "deal" to which the parties had reference was the construction of the improvements on the tract of land in order that it might be sold to the public. While it is true that, to a certain extent, the bankrupt recognized the procuring of the execution of the contract by Oswald as in some measure performing the services agreed to be rendered by him, which recognition is proved by the execution of the agreement of December 14th, 1925, yet this latter agreement is not an actual conveyance but only an agreement to convey. No time limit is set forth as to when the property shall be conveyed but at the conclusion of the agreement we find the two clauses above quoted requiring reconveyances after the approval and recordation of the map of the tract and requiring the claimant at such time to pay the release price to free the property from the lien of the trust deeds with which it was encumbered. It is therefore clear that it was the intention of the parties that the claimant, Richard Castle, should not be entitled to the property involved until the whole "deal" had been completed, which would require the installation of the improvements, the recordation of the map and the property ready for sale to the public. This stage in the proceedings was never reached, and it was the contention of counsel at the hearing that the agreement of December

14th, was in effect a conveyance by the bankrupt to the claimant, Richard Castle, and Castle would be guilty of laches, having with knowledge of the insolvent condition of the bankrupt and the existence of the encumbrances on the property, failed to tender to the trustee under the trust deeds the consideration as set forth in the letter of November 5th, 1925, for which he could have secured a release of the property described, thus permitting his interest to be forfeited by a foreclosure of the trust deed. Oswald refused to comply with his agreement and the bankrupt received nothing of value by reason of the services rendered by Richard Castle, whose claim should be disallowed.

Consolidated with the hearing of the claim of Richard Castle was the claim of George H. Oswald. This agreement is evidenced herein as claimant's Exhibit 3, and provides for the doing of certain improvement work upon the tract of land owned by the bankrupt at a cost of approximately $500,000.00. The parties of the first part in the agreement are Charles Stone, trustee, Charles Stone and Clara F. Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and W. I. Norcross, an unmarried man, the claimant George H. Oswald being the party of the second part. The agreement was signed by Charles Stone, trustee, Charles Stone, F. A. Arbuckle by Charles Stone, attorney in fact, John M. Pratt by Charles Stone, attorney in fact, W. I. Norcross by Charles Stone, attorney in fact and James Westervelt, as parties of the first part, and George H. Oswald. It appeared from the evidence that all of the parties of the

first part except Norcross were married at the time of the execution of the agreement and by the testimony of Stone that his interest in the property was community property. Arbuckle, Pratt and Norcross by a certain power of attorney filed with the trust executed in the matter, authorized Charles Stone to execute agreements of this character upon their behalf. No evidence was introduced empowering Charles Stone to sign the agreement upon behalf of the wives of the various parties, and in fact, he does not even purport to so sign. There are two questions involved, first, whether or not the wives of the parties of the first part are necessary parties to the agreement, without whose signatures the party of the second part could not be bound, and second, whether the claimant, George H. Oswald, refused to consider the agreement in effect without the signatures of these parties. Without regard to the wives of the other parties, it is clear that Clara F. Stone was the wife of Charles Stone at the time of the execution of the agreement and at the time the real property was acquired and that the property was community property, and that she had not executed the agreement. Under Section 172 A of the Civil Code of this state an agreement for the transferring or encumbering of any interest in real community property is void unless signed by both spouses. Paragraph 13 of the agreement purports to transfer and assign to the claimant all the right, title and interest of the bankrupt as security for the performance of the terms of the agreement upon their part.

Furthermore, the agreement appears to be one provided to be executed by certain parties. The elimination of one or more parties from the agreement without the

consent of the other party would constitute a material alteration rendering it void. It is clear from the evidence that the claimant, George H. Oswald, did not consent to the alteration of the agreement or waive the signatures of the wives of the various parties. On December 31st, 1925, Mr. Oswald's attorney wrote Mr. Stone as follows:

> "Mr. George Oswald has requested that I communicate with you in regard to the following matters:
>
> If you have secured the signatures of the parties of the first part to your contract with George H. Oswald, will you kindly forward the same to me.
>
> Will you also kindly forward the plans and profiles, and obtain the permits necessary to do the work and forward copies of the same to me, so that I can immediately take the matter up with Mr. Oswald."

On January 5th, 1926, Charles Stone wrote Mr. Blair, the claimant's attorney, as follows:

> "Your letter of Dec. 31st with reference to the Oswald improvement contract, received.
>
> We have obtained the signatures of all of the parties to the contract with exception of one, which will necessitate a trip to Santa Monica on the part of the writer and this will be done at the first possible moment.
>
> The contract which we are to deliver to you will supplant the original contract which was signed by the writer under a trust agreement and power of attorney for all the partners of the Beverly-Ridge Company." . . .

While the above communication refers to the signatures of the parties having been obtained to a contract, yet no evidence was introduced showing its execution and

delivery. Furthermore, had this new contract been delivered, it is apparent from the letter of January 5th that it was a different agreement than that of November 19, 1925. On January 23rd Mr. Blair wrote the bankrupt as follows:

> "On December 21st I wrote you and inquired if you had secured the signature of the parties of the first part to your contract with George H. Oswald. A few days later, I saw you at Mr. Castle's and you stated that you expected to have all the signatures within a day or two. As yet, I have not received the contract.
>
> Mr. Oswald has informed me that the plans and profiles and necessary permits to do the work have not been forwarded to him.
>
> I would like to call your attention to the fact that Mr. Oswald is contemplating the undertaking of other large contracts in the near future, and as a result would like to know if the above matters have been taken care of, and if not when they will be. Mr. Oswald feels that if this matter is not taken care of within the next few days, he will have to refuse to accept the contract."

It clearly appears that the claimant Oswald did not consent to the acceptance of the contract without the signature of all the parties named therein, and did in fact refuse to consider it in force and proceed with the work. While it is undoubtedly true that he had an additional reason, that the plans and profiles had not been filed with the proper authorities nor the necessary permits issued to enable him to proceed with the work according to law, yet the contract never became effective because of the absence of the signatures of all of its parties. No work was done by Mr. Oswald under the contract, and the bankrupt received nothing of value

from him. His claim is for profits he alleges would have accrued to him had he completed the contract. Counsel for the trustee will kindly prepare findings and orders disallowing both claims under consideration.

Dated November 27, 1928.

EARL E. MOSS,
Referee in Bankruptcy."

The question for determination is whether or not said order is a proper order.

That on the 17th day of December, 1928, petition for review was filed by George H. Oswald, through his attorney, Geo. D. Blair, Esq., which was granted and which petition for review is hereto attached.

The Referee is transmitting with this Certificate for Review a transcript of the testimony and proceedings had before him at the time of the hearing of the said matter.

I hand up herewith for the information of the Judges, the following papers:

1. Petition for Review
2. Proof of Unsecured Debt
3. Objections to claim of George Oswald
4. Opening brief of George H. Oswald in support of claim of unsecured debt.
5. Brief of trustee in opposition to said claim.

Dated - January 8, 1929.

EARL E. MOSS'
Referee in Bankruptcy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H.

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW.

To the Honorable, the Judges of the United States District Court, in and for the Southern District of California, Southern Division:

I, Earl E. Moss, Referee in Bankruptcy, to whom the above entitled proceedings were referred, do hereby certify:

That in the course of the proceedings an Order was made and entered on the 6th day of December, 1928, as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

No. 8547-H—(Claim of Richard Castle)

FINDINGS OF FACT AND CONCLUSIONS LAW.

In the Matter of BEVERLYRIDGE COMPANY,

Bankrupt.

This matter coming on regularly to be heard before me on the 14th day of November, 1928, John D. Beyer, Trustee for the Bankrupt herein, appearing to contest this claim, and Lorrin Andrews, appearing as his attorney, and Richard Castle appearing for his claim, and George D. Blair as attorney representing said claimant, and the Court having heard the evidence produced by the claimant and by the Trustee, and having heard argument of counsel, and the Trustee having admitted that

the sum of Eight Hundred, Eighty and no/100 Dollars ($880.00) advanced by claimant, Richard Castle, has been loaned to the Beverlyridge Company, now bankrupt, and was a just and lawful claim against said bankrupt, and having contested the balance of the claim herein, this Court finds as follows:

FINDINGS OF FACT

I.

That on the 16th day of June, 1926, an involuntary petition in bankruptcy was filed against the Beverlyridge Company, the bankrupt herein, in the United States District Court, in and for the Southern District of California, Southern Division.

II.

That on the 9th day of July, 1926, the said United States District Court, in and for the Southern District of California, Southern Division, adjudged the said Beverlyridge Company a Bankrupt.

III.

That on the 9th day of August, 1926, John D. Beyer was elected Trustee of said Bankrupt estate, and ever since said time has been and now is the Trustee of said Bankrupt estate.

IV.

That on the 5th day of November, 1925, Charles Stone, acting as Managing Director of the Beverlyridge Company, a co-partnership, wrote the claimant, Richard Castle, stating:

> "In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed we shall deed to you $25,000 worth of

property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500 and $1600."

V.

That on December 14, 1925, the Beverlyridge Company, by Charles Stone as Trustee, executed a document, the original of which has been filed in connection with this claim, as claimant's Exhibit 1. That this document, after identifying the parties, proceeds as follows:

> "Party of the first part, in consideration of a valuable sum in dollars, to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property," etc.

Thereafter a certain tract of land stipulated to contain 31,850 square feet in the Beverlyridge Tract was described. That the said document ends with the two following provisions:

> "It is further understood and agreed that as soon as the party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the tract which contains the above described premises, party of the second part shall quitclaim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.
>
> It is further understood and agreed that at the time of such conveyance party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain Deeds of Trust, each

of which is now a blanket lien on the within described premises and other property."

VI.

That the plat shown claimant, Richard Castle, divided the piece of property described by metes and bounds in the agreement set forth in the last finding, into three lots. That at no time did said claimant, Richard Castle, offer to pay or tender to anyone the release price of either $1500, or $1600, per lot.

VII.

That on or about the.....day of April, 1926, one of the Trust Deeds mentioned in the agreement of December 14, 1925, which was in existence on the property at the time of the execution of the letter of November 5, 1925, and the agreement of December 14, 1925, was foreclosed, and that thereby this claimant lost any claim that he might have in the real property mentioned in said agreement of December 14th.

VIII.

The Court finds that at all times the claimant had knowledge of the financial condition of the bankrupt, and loaned the sum of Eight Hundred and Eighty Dollars ($880.00) to the bankrupt, at its solicitation, to pay salaries which it was unable to pay, and at all times the claimant knew of the existence of the Trust Deeds upon the real property of the bankrupt, including the property to be turned over to him.

IX.

The Court finds that the services purported to have been performed by the claimant were to secure the execution by George H. Oswald of an agreement with the

bankrupt for the making of certain improvements on its real property.

X.

The Court finds that while a purported agreement to this effect was signed by George Oswald, it was never completely executed, in that, it was not signed by all the bankrupts, nor was it signed by all the parties to this agreement, to-wit: the wives of the partners comprising the Beverlyridge Company, the bankrupt herein.

XI.

The Court finds that the deal which, when completed, was to entitle the claimant to $25,000 worth of property in Beverlyridge, was never completed, and that said claimant did not perform any services for the Beverlyridge Company in accordance with his agreement.

XII.

The Court finds that George H. Oswald refused to comply with the terms of the agreement which he had signed, but which was incomplete as to the signatures of others, and that the bankrupt has received nothing of value by reason of the services rendered by Richard Castle.

XIII.

The Court finds that Richard Castle is entitled to Eight Hundred and Eighty Dollars ($880.00), which he loaned said bankrupt estate to permit it to pay certain bills and expenses, and for which he has never been repaid.

CONCLUSIONS OF LAW

(1) That said Richard Castle has no claim against the Bankrupt estate for $25,000, or any other sum, under

the agreements of November 5, 1925, or December 14, 1925, and has not been damaged in the sum of $25,000 or any sum whatsoever, and his claim for damages therefor is disallowed.

(2) That the Bankrupt estate owes to Richard Castle the sum of Eight Hundred and Eighty ($880.00) Dollars, loaned to said bankrupt estate by him to help it pay office-help and expenses.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED, that Richard Castle be allowed a claim against the bankrupt, the Beverlyridge Company, in the sum of Eight Hundred and Eighty Dollars ($880.00).

Dated this 6th day of December, 1928.

EARL E. MOSS,
Referee in Bankruptcy."

At the time of the decision in this matter an opinion was rendered herein and the reasons for the decision were set forth. The said opinion, to which the Court's attention is respectfully directed is as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In the Matter of BEVERLYRIDGE COMPANY,
Bankrupt.

OPINION ON CLAIMS OF RICHARD CASTLE AND GEORGE OSWALD.

Appearances:

Lorrin Andrews, Esq., representing the Trustee.

George DeLany Blair, Esq., representing the Claimants.

On November 5th, 1925, Charles Stone, as the man-

aging director of the bankrupt wrote the claimant Richard Castle stating:

> "In connection with your efforts on our behalf on obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed, we shall deed to you $25,000 worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500.00 and $1600."

On December 14th, 1925, the bankrupt, by Charles Stone as trustee, executed a document, the original of which has been filed herein as claimant's Exhibit 1. This document, after identifying the parties, proceeds as follows:

> "Party of the first part, in consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property" etc.

Thereafter a certain tract of land stipulated to contain 31,850 square feet in the Beverlyridge Tract was described. The document ends with the two following provisions:

> "It is further understood and agreed that as soon as party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the Tract which contains the above described premises, party of the second part shall quitclaim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.
>
> It is further understood and agreed that at the

> time of such conveyance party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain Deeds of Trust, each of which is now a blanket lien on the within described premises and other property."

Claimant Richard Castle testified that the plat that was shown him divided the piece of property described by metes and bounds in the agreement into three lots. At no time did he offer to pay or tender to anyone the release price of either $1500 or $1600 per lot. Approximately five months after the execution of the so-called agreement to convey (Claimant's Exhibit 1) a trust deed which was in existence on the property at the time of the execution of the letter of November 5th (Claimant's Exhibit 2) and the agreement of December 14th, was foreclosed, thereby eliminating any claims that this claimant might have in the real property. This claimant at all times had knowledge of the financial condition of the bankrupt, and in fact part of his claim includes the sum of $880.00 which he loaned to the bankrupt to pay salaries. He also knew of the existence of the encumbrances on the real property of the bankrupt.

The trustee contends first that there was no consideration for the agreement of December 14th, 1925, agreeing to convey the real property to the bankrupt, by reason of the fact that first, the services purported to have been performed by the claimant in securing the execution by George H. Oswald of an agreement with the bankrupt for the making of certain improvements on its real property, were not complete, because of the fact that all the members of the bankrupt co-partnership, and

their wives, the property being community real property, did not sign the agreement with Oswald. Claimant, however, proved that Oswald executed the agreement yet it is unquestionably true that in the absence of its execution by all of the parties thereto he could consider it void as to himself, and in fact did so treat it later. Eliminating from consideration the question of whether or not the form of agreement was satisfactory to all the members of the bankrupt, not having been signed by all of them and some of them not being present as witnesses to testify concerning its contents, it was signed by Oswald and some of the bankrupts. Under a trust agreement executed by the various members of the bankrupt firm, Charles Stone was appointed trustee with authority to make certain contracts upon the bankrupt's behalf. It was urged that the bankrupt or its trustee can not take advantage of the failure of some of its members to sign the agreement after having authorized its trustee to perform certain acts upon its part, still the authorization was not complete because it concerned community real property and the trust agreement was itself not signed by the wives of all parties.

There are, however, two other more important questions, either of which require the disallowance of this claim. It will be noted that the letter of November 5th contains the clause, "We herewith beg to state that when this deal is completed." The "deal" to which the parties had reference was the construction of the improvements on the tract of land in order that it might be sold to the public. While it is true that, to a certain extent, the bankrupt recognized the procuring of the execution of the contract by Oswald as in some measure performing the

services agreed to be rendered by him, which recognition is proved by the execution of the agreement of December 14th, 1925, yet this latter agreement is not an actual conveyance but only an agreement to convey. No time limit is set forth as to when the property shall be conveyed but at the conclusion of the agreement we find the two clauses above quoted requiring reconveyances after the approval and recordation of the map of the tract and requiring the claimant at such time to pay the release price to free the property from the lien of the trust deeds with which it was encumbered. It is therefore clear that it was the intention of the parties that the claimant, Richard Castle, should not be entitled to the property involved until the whole "deal" had been completed, which would require the installation of the improvements, the recordation of the map and the property ready for sale to the public. This stage in the proceedings was never reached, and it was the contention of counsel at the hearing that the agreement of December 14th, was in effect a conveyance by the bankrupt to the claimant, Richard Castle, and Castle would be guilty of laches, having with knowledge of the insolvent condition of the bankrupt and the existence of the encumbrances on the property, failed to tender to the trustee under the trust deeds the consideration as set forth in the letter of November 5th, 1925, for which he could have secured a release of the property described, thus permitting his interest to be forfeited by a foreclosure of the trust deed. Oswald refused to comply with his agreement and the bankrupt has received nothing of value by reason of the services rendered by Richard Castle, whose claim should be disallowed.

Consolidated with the hearing of the claim of Richard Castle was the claim of George H. Oswald. This agreement is evidenced herein as claimant's Exhibit 3, and provides for the doing of certain improvement work upon the tract of land owned by the bankrupt at a cost of approximately $500,000.00. The parties of the first part in the agreement are Charles Stone, trustee, Charles Stone and Clara F. Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and W. I. Norcross, an unmarried man, the claimant George H. Oswald being the party of the second part. The agreement was signed by Charles Stone, trustee, Charles Stone, F. A. Arbuckle by Charles Stone, attorney in fact, John M. Pratt by Charles Stones, attorney in fact, W. I. Norcross by Charles Stone, attorney in fact and James Westervelt, as parties of the first part, and George H. Oswald. It appeared from the evidence that all of the parties of the first part except Norcross were married at the time of the execution of the agreement and by the testimony of Stone that his interest in the property was community property. Arbuckle, Pratt and Norcross by a certain power of attorney filed with the trust executed in the matter, authorized Charles Stone to execute agreements of this character upon their behalf. No evidence was introduced empowering Charles Stone to sign the agreement upon behalf of the wives of the various parties, and in fact, he does not even purport to so sign. There are two questions involved, first, whether or not the wives of the parties of the first part are necessary parties to the agreement, without whose signatures the party of

the second part could not be bound, and second, whether the claimant, George H. Oswald, refused to consider the agreement in effect without the signatures of these parties. Without regard to the wives of the other parties, it is clear that Clara F. Stone was the wife of Charles Stone at the time of the execution of the agreement and at the time the real property was acquired and that the property was community property, and that she had not executed the agreement. Under Section 172 A of the Civil Code of this state an agreement for the transferring or encumbering of any interest in real community property is void unless signed by both spouses. Paragraph 13 of the agreement purports to transfer and assign to the claimant all the right, title and interest of the bankrupt as security for the performance of the terms of the agreement upon their part.

Furthermore, the agreement appears to be one provided to be executed by certain parties. The elimination of one or more parties from the agreement without the consent of the other party would constitute a material alteration rendering it void. It is clear from the evidence that the claimant, George H. Oswald, did not consent to the alteration of the agreement or waive the signatures of the wives of the various parties. On December 31st, 1925, Mr. Oswald's attorney wrote Mr. Stone as follows:

> "Mr. George Oswald has requested that I communicate with you in regard to the following matters:
>
> If you have secured the signatures of the parties of the first part to your contract with George H. Oswald, will you kindly forward the same to me.
>
> Will you also kindly forward the plans and profiles, and obtain the permits necessary to do the work

and forward copies of the same to me, so that I can immediately take the matter up with Mr. Oswald."

On January 5th, 1926, Charles Stone wrote Mr. Blair, the claimant's attorney, as follows:

> "Your letter of Dec. 31st with reference to the Oswald improvement contract, received.
>
> We have obtained the signatures of all of the parties to the contract with the exception of one, which will necessitate a trip to Santa Monica on the part of the writer and this will be done at the first possible moment.
>
> The contract which we are to deliver to you will supplant the original contract which was signed by the writer under a trust agreement and power of attorney for all partners of the Beverly-Ridge Company." * * *

While the above communication refers to the signatures of the parties having been obtained to a contract, yet no evidence was introduced showing its execution and delivery. Furthermore, had this new contract been delivered, it is apparent from the letter of January 5th that it was a different agreement than that of November 19, 1925. On January 23rd Mr. Blair wrote the bankrupt as follows:

> "On December 21st I wrote you and inquired if you had secured the signatures of the parties of the first part to your contract with George H. Oswald. A few days later, I saw you at Mr. Castle's and you stated that you expected to have all the signatures within a day or two. As yet, I have not received the contract.
>
> Mr. Oswald has informed me that the plans and profiles and necessary permits to do the work have not been forwarded to him.
>
> I would like to call your attention to the fact that Mr. Oswald is contemplating the undertaking of

other large contracts in the near future, and as a result would like to know if the above matters have been taken care of, and if not when they will be. Mr. Oswald feels that if this matter is not taken care of within the next few days, he will have to refuse to accept the contract."

It clearly appears that the claimant Oswald did not consent to the acceptance of the contract without the signature of all the parties named therein, and did in fact refuse to consider it in force and proceed with the work. While it is undoubtedly true that he had an additional reason, that the plans and profiles had not been filed with the proper authorities nor the necessary permits issued to enable him to proceed with the work according to law, yet the contract never became effective because of the absence of the signatures of all of its parties. No work was done by Mr. Oswald under the contract, and the bankrupt received nothing of value from him. His claim is for profits he alleges would have accrued to him had he completed the contract. Counsel for the trustee will kindly prepare findings and orders disallowing both claims under consideration.

Dated November 27, 1928.

EARL E. MOSS,
Referee in Bankruptcy."

The question for determination is whether or not said order is a proper order.

That on the 17th day of December, 1928, petition for review was filed by Richard Castle, through his attorney Geo. D. Blair, Esq., which was granted and which petition for review is hereto attached.

The Referee is transmitting with this Certificate for

Review a transcript of the testimony and proceedings had before him at the time of the hearing of the said matter.

I hand up herewith for the information of the Judges, the following papers:

1. Petition for Review.
2. Proof of Unsecured Debt.
3. Objections to the claim of Richard Castle.
4. Brief of trustee of Beverlyridge Company in opposition to said claim.
5. Opening brief of Richard Castle in support of claim of unsecured debt.
6. Exhibits.
7. Transcript.

Dated January 8, 1929.

EARL E. MOSS,
Referee in Bankruptcy.

[TITLE OF COURT AND CAUSE.]

No. 8547-H

PETITION TO REVIEW REFEREE'S ORDER
(RICHARD CASTLE)

To Earl E. Moss, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is a creditor of BEVERLYRIDGE COMPANY, the above named bankrupt, and that his claim has been allowed in part.

That in the course of the proceedings which were had on the 14th day of November, 1928, an order was made upon the 6th day of December, 1928, a copy of which

is hereto annexed, and was made and entered herein. That such order was and is erroneous in that: (1) the findings of fact and conclusions of law are not supported by the evidence; (2) that the order pursuant thereto is contrary to law; (3) the court erred in admitting testimony over the objections of the claimant and (4) the court erred in disallowing a portion of the said claim, and (5) the court erred in refusing to admit testimony of the claimant.

WHEREFORE your petitioner feeling aggrieved because of such order prays that the same may be reviewed as provided in the Bankruptcy Act of 1896 and General Order XXVII.

Dated: Los Angeles, California, December 14th, 1928.

RICHARD CASTLE,
Petitioner.

GEO. D. BLAIR,
Attorney for Petitioner.

[TITLE OF COURT AND CAUSE.]

No. 8547-H (Claim of Richard Castle)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on regularly to be heard before me on the 14th day of November, 1928, John D. Beyer, Trustee for the Bankrupt herein, appearing to contest this claim, and Lorrin Andrews, appearing as his attorney, and Richard Castle appearing for his claim, and George D. Blair as attorney representing said claimant, and the Court having heard the evidence produced by

the claimant and by the Trustee, and having heard argument of counsel, and the Trustee having admitted that the sum of Eight Hundred Eighty and no/100 Dollars ($880.00) advanced by claimant, Richard Castle, has been loaned to the Beverlyridge Company, now bankrupt, and was a just and lawful claim against said bankrupt, and having contested the balance of the claim herein, this Court finds as follows:

FINDINGS OF FACT

I.

That on the 16th day of June, 1926, an involuntary petition in bankruptcy was filed against the Beverlyridge Company, the bankrupt herein, in the United States District Court, in and for the Southern District of California, Southern Division.

II.

That on the 9th day of July, 1926, the said United States District Court, in and for the Southern District of California, Southern Division, adjudged the said Beverlyridge Company a Bankrupt.

III.

That on the 9th day of August, 1926, John D. Beyer was elected Trustee of said Bankrupt estate, and ever since said time has been and now is the Trustee of said Bankrupt estate.

IV.

That on the 5th day of November, 1925, Charles Stone, acting as Managing Director of the Beverlyridge Company, a co-partnership, wrote the claimant, Richard Castle, stating:

> "In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—

> We herewith beg to state that when this deal is completed we shall deed to you $25,000 worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500 and $1600."

V.

That on December 14, 1925, the Beverlyridge Company, by Charles Stone as Trustee, executed a document, the original of which has been filed in connection with this claim, as claimant's Exhibit 1. That this document, after identifying the parties, proceeds as follows:

> "Party of the first part, in consideration of a valuable sum in dollars, to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property," etc.

Thereafter a certain tract of land stipulated to contain 31,850 square feet in the Beverlyridge Tract was described. That the said document ends with the two following provisions:

> "It is further understood and agreed that as soon as the party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the tract which contains the above described premises, party of the second part shall quitclaim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.
>
> It is further understood and agreed that at the time of such conveyance party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by

the trustee under two certain Deed of Trust, each of which is now a blanket lien on the within described premises and other property."

VI.

That the plat shown claimant, Richard Castle, divided the piece of property described by metes and bounds in the agreement set forth in the last finding, into three lots. That at no time did said claimant, Richard Castle, offer to pay or tender to anyone the release price of either $1500, or $1600 per lot.

VII.

That on or about the.....day of April, 1926, one of the Trust Deeds mentioned in the agreement of December 14, 1925, which was in existence on the property at the time of the execution of the letter of November 5, 1925, and the agreement of December 14, 1925, was foreclosed, and that thereby this claimant lost any claim that he might have in the real property mentioned in said agreement of December 14th.

VIII.

The Court finds that at all times the claimant had knowledge of the financial condition of the bankrupt, and loaned the sum of Eight Hundred and Eighty Dollars ($880.00), at its solicitation, to pay salaries which it was unable to pay, and at all times the claimant knew of the existence of the Trust Deeds upon the real property of the bankrupt, including the property to be turned over to him.

IX.

The Court finds that the services purported to have been performed by the claimant were to secure the execution by George H. Oswald of an agreement with the

bankrupt for the making of certain improvements on its real property.

X.

The Court finds that while a purported agreement to this effect was signed by George Oswald, it was never completely executed, in that, it was not signed by all the bankrupts, nor was it signed by all the parties to this agreement, to-wit: the wives of the partners comprising the Beverlyridge Company, the bankrupt herein.

XI.

The Court finds that the deal which, when completed, was to entitle the claimant to $25,000 worth of property in Beverlyridge, was never completed, and that said claimant did not perform any services for the Beverlyridge Company in accordance with his agreement.

XII.

The Court finds that George H. Oswald refused to comply with the terms of the agreement which he had signed, but which was incomplete as to the signatures of others, and that the bankrupt has received nothing of value by reason of the services rendered by Richard Castle.

XIII.

The Court finds that Richard Castle is entitled to Eight Hundred and Eighty Dollars ($880.00), which he loaned said bankrupt estate to permit it to pay certain bills and expenses, and for which he has never been repaid.

CONCLUSIONS OF LAW

(1) That said Richard Castle has no claim against the Bankrupt estate for $25,000, or any other sum, under the agreements of November 5, 1925, or December 14, 1925, and has not been damaged in the sum of $25,000

or any sum whatsoever, and his claim for damages therefor is disallowed.

(2) That the Bankrupt estate owes to Richard Castle the sum of Eight Hundred and Eighty ($880.00) Dollars, loaned to said bankrupt estate by him to help it pay office-help and expenses.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED, that Richard Castle be allowed a claim against the bankrupt, the Beverlyridge Company, in the sum of Eight Hundred and Eighty Dollars ($880.00).

Dated this 6 day of December, 1928.

EARL E. MOSS,

Referee in Bankruptcy.

[TITLE OF COURT AND CAUSE.]

No. 8547-H

PETITION TO REVIEW REFEREE'S ORDER. (GEORGE H. OSWALD)

To Earl E. Moss, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is a creditor of BEVERLYRIDGE COMPANY, the above named bankrupt, and that his claim has been allowed in part.

That in the course of the proceedings which were had on the 14th day of November, 1928, an order was made upon the 6th day of December, 1928, a copy of which is hereto annexed, and was made and entered herein. That such order was and is erroneous in that: (1) the findings of fact and conclusions of law are not supported by the evidence; (2) that the order pursuant thereto is con-

trary to law; (3) the court erred in admitting testimony over the objections of the claimant and (4) the court erred in disallowing a portion of the said claim, and (5) the court erred in refusing to admit testimony of the claimant.

WHEREFORE your petitioner feeling aggrieved because of such order prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and General Order XXVII.

Dated: Los Angeles, California, December 14th, 1928.

GEO. H. OSWALD,
Petitioner.

GEO. D. BLAIR,
Attorney for Geo. H. Oswald.

[TITLE OF COURT AND CAUSE.]

No. 8547-H (Claim of George Oswald)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on regularly to be heard before me on the 14th day of November, 1928, John D. Beyer, Trustee for the Bankrupt herein, appearing to contest this claim, and Lorrin Andrews, appearing as his attorney, and George Oswald appearing for his claim, and George D. Blair as attorney representing said claimant, and the Court having heard the evidence produced by the claimant and by the Trustee, and having heard argument of counsel, and the Trustee having admitted that the sum of Three Hundred Two and 43/100 Dollars ($302.43) advanced by claimant, George Oswald, has

been loaned to the Beverlyridge Company, now bankrupt, and was a just and lawful claim against said bankrupt, and having contested the balance of the claim herein, this Court finds as follows:

FINDINGS OF FACT

I.

That on the 16th day of June, 1926, an involuntary petition in bankruptcy was filed against the Beverlyridge Company, the bankrupt herein, in the United States District Court, in and for the Southern District of California, Southern Division.

II.

That on the 9th day of July, 1926, the said United States District Court, in and for the Southern District of California, Southern Division, adjudged the said Beverlyridge Company a Bankrupt.

III.

That on the 9th day of August, 1926, John D. Beyer was elected Trustee of said Bankrupt estate, and ever since said time has been and now is the Trustee of said Bankrupt estate.

IV.

The Court finds that on or about the 19th day of November, 1925, a contract was drawn, the parties to which were as follows: Charles Stone, Trustee, Charles Stone and Clara F. Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and W. I. Norcross, an unmarried man, being the parties of the first part, and claimant, George H. Oswald, being party of the second part. That

said agreement is filed with the records of the case and known as claimant's Exhibit 3. That the agreement was signed by Charles Stone, Trustee, Charles Stone, F. A. Arbuckle, by Charles Stone, Attorney in Fact, John M. Pratt, by Charles Stone, Attorney in Fact, W. I. Norcross, by Charles Stone, Attorney in Fact, and James Westervelt, as parties of the first part, and George H. Oswald, as party of the second part. Said contract is filed as an exhibit in this case and marked claimant's Exhibit 3.

V.

The Court finds from the evidence that all of the parties of the first part, except W. I. Norcross, were, at the time the agreement was made and of its execution, married men.

VI.

The Court finds that the interest of Charles Stone in the property mentioned in said agreement was a community interest in which his wife shares, as community property.

VII.

The Court finds that F. A. Arbuckle, John M. Pratt and W. I. Norcross, by a certain power of attorney filed with a trust executed in the matter, authorized Charles Stone to execute agreements of the character of the agreement entered into in claimant's Exhibit 3, upon their behalf.

VIII.

The Court finds that there is no evidence empowering Charles Stone to sign the agreement on behalf of the wives of the various parties, nor did he so sign, nor is there any evidence that he claimed to *present* said wives.

IX.

The Court finds that Clara F. Stone was the wife of Charles Stone at the time of the execution of the agreement, and at the time the real property was acquired by her husband, and that she never executed the agreement, marked claimant's Exhibit 3.

X.

The Court finds that on the 31st day of December, 1925, the claimant's, George Oswald's, attorney wrote Mr. Stone as follows:

> "Mr. George Oswald has requested that I communicate with you in regard to the following matters:
>
> If you have secured the signatures of the parties of the first part to your contract with George H. Oswald will you kindly forward the same to me.
>
> Will you also kindly forward the plans and profiles, and obtain the permits necessary to do the work and forward copies of the same to me, so that I can immediately take the matter up with Mr. Oswald."

XI.

The Court finds that on January 5, 1926, Charles Stone wrote George D. Blair, the claimant's attorney, as follows:

> "Your letter of Dec. 31st with reference to the Oswald improvement contract, received.
>
> We have obtained the signatures of all of the parties to the contract with the exception of one, which will necessitate a trip to Santa Monica on the part of the writer and this will be done at the first possible moment.
>
> The contract which we are to deliver to you will supplant the original contract which was signed by the writer under a trust agreement and power of attorney for all the partners of the Beverly-Ridge Company . . ."

XII.

The Court finds that on January 23, 1926, George D. Blair, attorney for the claimant, George Oswald, wrote the Beverlyridge Estate as follows:

> "On December 21st I wrote you and inquired if you had secured the signature of the parties of the first part to your contract with George H. Oswald. A few days later, I saw you at Mr. Castle's and you stated that you expected to have all the signatures within a day or two. As yet, I have not received the contract.
>
> Mr. Oswald has informed me that the plans and profiles and necessary permits to do the work have not been forwarded to him.
>
> I would like to call your attention to the fact that Mr. Oswald is contemplating the undertaking of other large contracts in the near future, and as a result would like to know if the above matters have been taken care of, and if not when they will be. Mr. Oswald feels that if this matter*s* is not taken care of within the next few days, he will have to refuse to accept the contract."

XIII.

The Court finds that the contract, marked claimant's Exhibit 3, and dated the 19th day of November, 1925, never became effective because of the absence of the signatures of all of its parties, and the claimant, George Oswald did not consent to the acceptance of the contract without the signature of all of the parties named herein, and did in fact refuse to consider it in force and proceed with the work.

XIV.

The Court finds that George Oswald, claimant, never did any work under said contract dated the 19th day of November, 1925, and marked claimant's Exhibit 3.

XV.

The Court finds that George Oswald is entitled to Three Hundred Two and 43/100 Dollars ($302.43), which he loaned said bankrupt on the 8th day of December, 1925, to enable the bankrupt to pay its telephone bill.

CONCLUSIONS OF LAW

(1) That George Oswald is entitled to the sum of Three Hundred, Two and 43/100 Dollars ($302.43) from said bankrupt, being money loaned by him to said bankrupt to enable them to pay their telephone bill.

(2) That George Oswald is entitled to no damages from said Bankrupt.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED, That George Oswald is entitled to the sum of Three Hundred, Two and 43/100 ($302.43) Dollars from said Bankrupt.

Dated this 6th day of December, 1928.

EARL E. MOSS,
Referee in Bankruptcy.

At a stated term, to wit: The January Term, A. D. 1929, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 18th day of April in the year of our Lord one thousand nine hundred and twenty-nine.

Present: The Honorable Edward J. Henning, District Judge.

In the Matter of Beverly Ridge Co., Bankrupt.

No. 8547-H Bkcy.

The Court having ordered on February 4th, 1929 that review of the order of Referee Moss be submitted on briefs to be filed 10x10x5, and no briefs having been filed, and the Court being cognizant of the three stipulations on file extending time to file briefs, it is by the Court ordered that the findings of the Referee be, and they are hereby affirmed.

70/974

At a stated term, to wit: The January Term, A. D. 1929, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 3rd day of May in the year of our Lord one thousand nine hundred and twenty-nine.

Present: The Honorable Edward J. Henning, District Judge.

In the Matter of Beverly Ridge Co., Bankrupt.

No. 8547-H Bkcy.

The Court having affirmed the Order of the Referee herein, by order made on April 18th, 1929; no briefs having been filed thereon by counsel, as ordered by the Court on February 2nd, 1929; and thereafter counsel having filed their briefs, and the same having been duly submitted; upon consideration whereof, it is now by the Court ordered that the said Order of the Referee be, and the same is hereby re-affirmed.

71/43.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FROM AN ORDER AFFIRMING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER THEREON OF THE REFEREE IN BANKRUPTCY, REJECTING A PORTION OF THE CLAIM OF RICHARD CASTLE.

To the Honorable Edward J. Henning, Judge of the United States District Court for the Southern District of California, Central Division:

The above named claimant, Richard Castle, conceiving himself aggrieved by the order and decree entered on the 18th day of April, 1929, and on the 3rd day of May, 1929, in the above entitled proceeding, affirming the Findings of Fact and Conclusions of Law and order thereon of the Referee in Bankruptcy, rejecting a portion of the claim of Richard Castle, does hereby petition for an appeal from the said order and decrees to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his appeal may be allowed and a citation granted directed to John Beyer, Trustee of the above entitled bankrupt estate, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the

United States Circuit Court of Appeals for the Ninth Circuit.

RICHARD CASTLE,
Claimant.

GEO. D. BLAIR,
J. GILBERT FALL,
Attorneys for Claimant.

(Endorsed): Filed May 17, 1929 at 45 min past 4 o'clock p. m. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H

ASSIGNMENT OF ERRORS IN RE CLAIM OF RICHARD CASTLE

Comes now RICHARD CASTLE, claimant and complainant herein, and files the following assignment of errors on appeal from the orders of this Court dated April 18, 1929, and May 3, 1929.

I.

That the Findings of Fact and Conclusions of Law are not supported by the evidence, and the United States District Court for the Southern District of California, Central Division, erred in finding

(a) (Finding No. X) That while a purported agreement was signed by George Oswald, it was never completely executed, in that, it was not signed by all the bankrupts, nor was it signed by all the parties to this agreement, to-wit: the wives of the partners comprising the Beverlyridge Company, the bankrupt herein.

(b) (Finding No. XI) That the deal which, when

completed, was to entitle the claimant to $25,000 worth of property in Beverlyridge, was never completed, and that said claimant did not perform any services for the Beverlyridge Company in accordance with his agreement.

(c) (Finding No. XII) That George H. Oswald refused to comply with the terms of the agreement which he had signed, but which was incomplete as to the signatures of others, and that the bankrupt has received nothing of value by reason of the services rendered by Richard Castle.

(d) (Finding No. XIII) That Richard Castle is entitled to Eight Hundred and Eighty ($880.00) Dollars, which he loaned said bankrupt estate to permit it to pay certain bills and expenses, and for which he has never been repaid.

(e) (Conclusions of Law 1) That said Richard Castle has no claim against the Bankrupt estate for $25,000, or any other sum, under the agreements of November 5, 1925, or December 14, 1925, and has not been damaged in the sum of $25,000 or any sum whatsoever, and his claim for damages therefor is disallowed.

(f) (Conclusion of Law 2) That the Bankrupt estate owes to Richard Castle the sum of Eight Hundred and Eighty ($880.00) Dollars, loaned to said bankrupt estate by him to help it pay office held and expenses.

II.

That the order pursuant to the findings is contrary to law.

III.

That the Court erred in admitting testimony over the objections of the claimant.

IV.

That the Court erred in disallowing a portion of the said claim.

V.

That the Court erred in refusing to admit testimony of claimant.

WHEREFORE, he prays that the said order may be reversed and his claim allowed as prayed for.

Dated May 17, 1929.

RICHARD CASTLE, *Claimant,*
By GEO. D. BLAIR,
J. GILBERT FALL,
Attorneys for Claimant.

(Endorsed): Filed May 17· 1929 at 45 min. past 4 o'clock p. m., R. S. Zimmerman, Clerk, By B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FROM AN ORDER AFFIRMING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER THEREON OF THE REFEREE IN BANKRUPTCY, REJECTING A PORTION OF THE CLAIM OF GEO. H. OSWALD.

To the Honorable Edward J. Henning, Judge of the United States District Court for the Southern District of California, Central Division:

The above named claimant, Geo. H. Oswald, conceiving himself aggrieved by the order and decree entered

on the 18th day of April, 1929, and the 3rd day of May, 1929, in the above entitled proceeding, affirming the Findings of Fact and Conclusions of Law and order thereon of the Referee in Bankruptcy, rejecting a portion of the claim of Geo. H. Oswald, does hereby petition for an appeal from the said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his appeal may be allowed and a citation granted directed to John Beyer, Trustee of the above entitled bankrupt estate, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

GEO. H. OSWALD,
Claimant.

GEO. D. BLAIR,
J. GILBERT FALL,
Attorneys for Claimant.

(Endorsed): Filed May 17, 1929 at 45 min past 4 o'clock p. m. R. S. Zimmerman, Clerk, By B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H

ASSIGNMENT OF ERRORS IN RE CLAIM OF GEO. H. OSWALD.

Comes now GEO. H. OSWALD, claimant and complainant herein, and files the following assignment of errors

on appeal from the orders of this Court dated April 8, 1929, and May 3, 1929:

I.

That the Findings of Fact and Conclusions of Law are not supported by the evidence, and the United States District Court for the Southern District of California, Central Division, erred in finding

(a) (Finding No. VI) That the interest of Charles Stone in the property mentioned in the agreement was a community interest in which his wife shares, as community property.

(b) (Finding No. VIII) That there is no evidence enpowering Charles Stone to sign the agreement on behalf of the wives of the various parties, nor did he so sign, nor is there any evidence that he claimed to represent said wives.

(c) (Finding No. XIII) That the contract, marked claimant's Exhibit 3, and dated the 19th day of November, 1925, never became effective because of the absence of the signatures of all of its parties, and the claimant, George Oswald did not consent to the acceptance of the contract without the signature of all of the parties named herein, and did in fact refuse to consider it in force and proceed with the work.

(d) (Finding No. XV) That George Oswald is entitled to Three Hundred, Two and 43/100 Dollars ($302.43), which he loaned said bankrupt on the 8th day of December, 1925, to enable the bankrupt to pay its telephone bill.

(e) (Conclusions of Law 1) That George Oswald is entitled to the sum of Three Hundred, Two and 43/100 Dollars ($302.43) from said bankrupt, being money

loaned by him to said bankrupt to enable them to pay their telephone bill.

(f) That George Oswald is entitled to no damages from said bankrupt. (Conclusions of Law 2.)

II.

That the order pursuant to the Findings is contrary to law.

III.

That the Court erred in admitting testimony over the objections of the claimant.

IV.

That the Court erred in disallowing a portion of the said claim.

V.

That the Court erred in refusing to admit testimony of claimant.

WHEREFORE, he prays that the said order may be reversed and his claim allowed, as prayed for.

GEO. H. OSWALD, *Claimant.*

By GEO. D. BLAIR,
J. GILBERT FALL,
Attorneys for Claimant.

(Endorsed); Filed May 17· 1929 at 45 min past 4 o'clock p. m. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H
(Claim of Richard Castle)
ORDER ALLOWING APPEAL.

IT IS HEREBY ORDERED that the appeal in the above entitled matter to the United States Circuit Court of

Appeals for the Ninth Circuit be and the same is hereby allowed as prayed, and that bond on appeal in the above entitled matter is fixed at $250.00.

Dated this 17th day of May, 1929.

EDWARD J. HENNING,
United States District Judge.

(Endorsed); Filed May 17· 1929 at 45 min past 4 o'clock p. m. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H
(Claim of Geo. H. Oswald)
ORDER ALLOWING APPEAL.

IT IS HEREBY ORDERED that the appeal in the above entitled matter to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed as prayed, and that bond on appeal in the above entitled matter is fixed at $250.00.

Dated this 17th day of May, 1929.

EDWARD J. HENNING,
United States District Judge.

(Endorsed): Filed May 17, 1929, at 45 min past 4 o'clock p. m. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

In Bankruptcy No. 8547-H
STATEMENT OF THE EVIDENCE.

BE IT REMEMBERED that these claims came on for hearing on the 14th day of November, 1928, before the

Hon. Earl E. Moss, Referee in Bankruptcy, Richard Castle and George H. Oswald, Claimants, being represented by their attorney, George D. Blair, Esq., and John Beyer, Trustee of the Beverlyridge Company, a co-partnership, Bankrupt, being represented by his attorney, Lorrin Andrews, Esq., whereupon the testimony hereinafter set forth was taken.

That it was agreed that a portion of the claim of George H. Oswald, to-wit: Three Hundred Two Dollars ($302.00) be approved, and a portion of the claim of Richard Castle, to-wit: Eight Hundred Eighty Dollars ($880.00) be approved. As to the balance of the claim of each party, proof was then produced as follows:

Richard Castle, the claimant was called as a witness on behalf of the claimants, and being duly sworn, testified as follows:

Direct Examination

My full name is Richard Castle and I am the claimant in these proceedings. On being shown a contract drawn between Richard Castle and Charles F. Stone, grantor, I state that that is my signature.

Said document was offered and received in evidence and marked Claimant's Exhibit 1, and is in part in words and figures as follows, to-wit:

"AGREEMENT TO CONVEY
REAL ESTATE.

This Agreement, made this 14th day of December, 1925, by and between CHARLES STONE, as trustee under a Deed and Declaration of Trust dated April 18, 1925, and recorded in the office of the Recorder of Los Angeles County, California, on the 21st day of May, 1925, in Book 4002 of Miscellaneous Records at Page 108, party of the first part, and

RICHARD CASTLE of Los Angeles, California, party of the second part.

Party of the first part, in consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property in the City of Los Angeles, County of Los Angeles, State of California, to-wit: (here the property is described by metes and bounds)

It is expressly understood and agreed, however, by both parties hereto that the deed to be executed by party of the first part pursuant hereto shall contain restrictions as nearly identical as may be with restrictions (1), (2), (3) and (5) and also restrictions similar to restriction No. (4) as contained in all grant deeds heretofore executed by party of the first part conveying any lot or lots in Tract 8080 in the City of Los Angeles, as shown on Map thereof recorded in Book of Maps, Page , in the office of the Recorder of Los Angeles County aforesaid.

It is further understood and agreed that as soon as party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the Tract which contains the above described premises, party of the second part shall quitclaim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.

It is further understood and agreed that at the time of such conveyance party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain Deeds of Trust, each of which is now a blanket lien on the within described premises and other property.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.

CHARLES STONE.
Trustee
Grantor.
RICHARD CASTLE
Grantee.

STATE OF CALIFORNIA
County of Los Angeles—ss.

Be it remembered that on this 14th day of December, 1925, before me, Gertrude M. Hartman, a notary public in and for said county and state, personally appeared Charles Stone and Richard Castle, each personally known to me and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

GERTRUDE M. HARTMAN,
Notary Public in and for the County of Los Angeles, State of California.

ENDORSEMENT: Return to Richard Castle, 9116 W. Pico, Los Angeles, Calif., Compared Document—Haynes, Book-Elliott Recorded February 9, 1926, 27 min. past 3 P. M. in Book 5567 at page 250 of Official Records, Los Angeles County, Cal."

(Witness continuing) This letter dated November 5th was delivered to me by Charles Stone. It is his signature. I saw him write it.

Whereupon the letter dated November 5, 1925, addressed to Mr. Richard Castle and signed by the Beverlyridge Company, Charles Stone, Managing Director was offered and received in evidence as Claimant's Exhibit No. 2, and is in words and figures as follows:

"November 5, 1925

Mr. Richard Castle
9150 West Pico
Los Angeles
Dear Sir:

In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed, we shall deed to you $25,000. worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500. and $1600.

Very truly yours,
Beverlyridge Company
CHARLES STONE
CS-am *Managing Director"*

(Witness continuing) Pursuant to the letter dated November 5th, I did not have any transactions with any other person other than Charles Stone in connection with the Beverlyridge. I did endeavor to obtain a contract from Mr. Oswald. The contract with Mr. Oswald was entered into. On being handed a document signed by George H. Oswald, party of the second part; Charles Stone, trustee, Charles Stone, etc., I will state that Mr. Stone signed it. I was there when it was signed. I will also state that George Oswald signed it.

Whereupon the agreement was offered and received in evidence as Claimant's Exhibit 3, over objection of counsel for the trustee, which is in words and figures as follows, to-wit:

"THIS AGREEMENT made and entered into this 18 day of November, A. D. 1925, by and between Charles Stone, Trustee, Charles Stone and Clara D. Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and W. I. Norcross, an un-

married man, parties of the first part, and George H. Oswald, party of the second part, WITNESSETH:

(Here is set forth the improvements to be undertaken by George H. Oswald in the subdivision)

IN WITNESS WHEREOF, the parties have hereto set their hands and seals the day and year first above written.

CHARLES STONE, *Trustee*
CHARLES STONE

F. A. ARBUCKLE by
CHARLES STONE, *Attorney in fact*

JOHN M. PRATT, by
CHARLES STONE, *Attorney in fact*

W. I. NORCROSS by
CHARLES STONE, *Attorney in fact.*

JAMES WESTERVELT
Parties of the First Part.

GEO. H. OSWALD
Party of the Second Part.

STATE OF CALIFORNIA
County of Los Angeles—ss.

On this 19 day of November, in the year 1925, A. D. before me Anne Morgan a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Charles Stone and Charles Stone, Trustee personally known to me to be the persons whose names are subsribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County the day and year in this certificate first above written.

ANNE MORGAN,
Notary Public in and for Los Angeles County, State of California.

ENDORSEMENT: Return to Geo. D. Blair, 711 Security Bldg., Los Angeles, California. Recorded November 20 1925, 34 min. past 1 P. M. in Book

5528 at page 81 of Official Records, Los Angeles County, Cal.
Compared—Read by Kline—Document Aitken"

(Witness continuing) That is the contract that I endeavored to obtain from Mr. Oswald for Mr. Stone of the Beverly Ridge Company.

Whereupon Mr. Andrews, attorney for the trustee, objected to the question as calling for conclusion of the witness and the objection was sustained by the Referee.

(Witness continuing) I had conversations with Mr. Stone with reference to obtaining a contract with Mr. Oswald in his office in the Wright and Callendar Building, the date of which was prior to the time of the contract just shown me.

Whereupon Mr. Andrews objected to the form of question asked on the ground that it would vary the terms of the writing.

The Referee called attention to Claimant's Exhibit 1, agreement between Charles Stone and Richard Castle, which sets forth that in consideration of a valuable sum in dollars to him in hand paid, party of the first part agreed to convey certain real property and stated that the consideration could be shown and supplied by other than documentary evidence.

(Witness continuing) Mr. Stone was anxious to have his tract improved. I told Mr. Stone I thought I could get Mr. Oswald to install the improvements complete there and make a satisfactory contract to both parties. Mr. Stone said he would be anxious to enter the deal. I told him I thought I could get Mr. Oswald to take the job if he could give Mr. Oswald a satisfactory contract, and he said he would, and I was to get for that contract

these lots valued at $25,000.00. I was to get a $25,000.00 commission and was to take property for my commission, and I was to take these lots subject to release prices of $1500 to $1600 a lot. That was mentioned in the letter.

Mr. Blair: Now, did you obtain that contract from Mr. Oswald?

Mr. Andrews: I object to that, your Honor please, as a conclusion.

The Referee: Yes, state what was done.

Mr. Blair: Q. What was done after that?

A. Why, Mr. Oswald agreed—Mr. Oswald and Mr. Stone agreed on a contract.

Mr. Andrews: That of course we object to as a conclusion. We are contesting that there *wver* was a contract legally signed. I have already made the objection, your Honor, contesting anything was done, and I think under the circumstances I will have to insist he testifies what he knows as to what was said and done by the parties. He said "we agreed to do this and that."

The Referee: After your conversation with Mr. Stone, what did you do with reference to Mr. Oswald?

A. Why, I got Mr. Oswald to agree to do this work—

Mr. Andrews: That I certainly object to.

The Referee: Yes.

A. For a certain price.

The Referee: Yes. Tell what documents passed between you and Mr. Oswald and what conversation you had.

A. I took it up with Mr. Oswald and explained the deal and took Mr. Oswald over the property, and Mr. Oswald made prices, checked up the different things, water and gas and sewers and so forth, and made me a

price, and I submitted that price to Mr. Stone and Mr. Stone accepted it. All that I know about Mr. Stone's accepting it is this contract (Claimant's Exhibit 3). I was present at the time the contract was signed and it was signed in Mr. Blair's office. Mr. Westervelt, Mr. Stone, Mr. Oswald and Mr. Blair and I were there. Mr. Stone said he would secure the permits, profiles and necessary engineering and deliver it to Mr. Oswald at his office.

Q. (Mr. Blair): Do you know whether or not Charles Stone ever caused to be recorded in the office of the County Recorder a map or plat of the tract showing the lots you were to receive?

Mr. Andrews: That is objected to as calling for the conclusion of the witness—

(Argument between counsel and Referee):

The Referee: I don't see it would be very material whether they recorded the map or not.

Mr. Blair: If that is your Honor's position, very well. I merely offer that evidence but if that is your Honor's position it covers a subject we need not take up.

(Witness continuing) After that document dated November 19, signed by Charles Stone and George H. Oswald, was executed, the instrument I handed you there, marked Claimant's Exhibit 1, was delivered to me by Mr. Stone.

I have been in the real estate business for about five years and I am familiar with the prices in the district and locality in which this property that was to be conveyed to me was located, and my opinion of the value of that property is $25,000.00. There were three lots to be conveyed to me and I do not know the numbers of

them as they were described in metes and bounds. The approximate size was 50,000 square feet, and divided into three lots of approximately one-third acre or three-eighths acre each, and I considered the lots worth about $8300.00 each—that is fully improved, and I was to get the property with improvements all in and paid for. The property was never conveyed to me.

Whereupon, the following stipulation was entered into by and between counsel:

That at this time, which was known to Mr. Castle, two trust deeds were on the property, each was on record, and in each the trustee was the Title Insurance and Trust Company, and both were for moneys loaned by the Hogan Finance Company to the Beverlyridge Company. That the trust deeds were ultimately foreclosed and the title to the property was gone out of the Beverlyridge Company into the Hogan Finance Company; that the title passed about April 24, 1926, that the Hogan Finance Company foreclosed their trust deeds and the Beverlyridge Company lost its equity in the lots.

The Referee: Wouldn't the claimant's services, assuming that he agreed to render certain services upon the execution of a certain contract and was to receive certain property as the result of those services, wouldn't his part of the contract then be fulfilled when he procured the execution of a binding contract?

Mr. Andrews: If the court please, in the first place we are going to try to show there never was a binding contract between Mr. Oswald and the Beverlyridge Company.

The Referee: What?

Mr. Andrews: In the first place because, as your

Honor will see, that contract was not signed by all the parties, and Mr. Oswald refused to go on with it and Mr. Blair notified the Beverlyridge Company that they would not go ahead with it until they secured the other signatures, which never was done. Consequently this gentleman was paid by the giving of the deed to these lots, and if the court please, for months thereafter the plat was filed and for months thereafter he failed to pay the release price which, if he had done so, he would get the property in full, but through his own latches and refusal for four or five months to pay the release price after this agreement was in here the property was foreclosed, but he is guilty of latches. They did their part in turning over to him this property. It was for him to pay the release price and then he would have had the property for his own and it would have been released by the Hogan Finance Company. He did nothing but lay still with this document in his possession and finally through his failure to pay the release price, which he agrees to do in this agreement, he lost the property.

The Referee: Your defense is divided then into two parts.

Mr. Andrews: Yes.

The Referee: First, that Mr. Oswald refused to proceed under the contract because it was not signed by all the parties.

Mr. Andrews: Yes, your Honor.

The Referee: And secondly,—

Mr. Andrews: That the contract was never proceeded with at all.

The Referee: Secondly, that at any rate the Beverlyridge Company complied by deeding it to Mr. Castle.

Mr. Andrews: Yes.

The Referee: The property agreed upon.

Mr. Andrews: Yes, your Honor.

The Referee: Which he could have had released and conveyed to him upon the payment of the release price of between fifteen and sixteen hundred dollars.

Mr. Andrews: Yes, your Honor.

The Referee: Any further questions.

Mr. Blair: In answer to the first proposition I will put it this way. The first arrangement was the short letter you have there stating he would give him $25,000.00 worth of property subject to the release price. Now, what happened after that? He obtained a contract, at least so in their opinion, and they turned around and deeded him the property under the contract, or made an agreement to give him the property after the contract of November 19, which was signed by Oswald. In other words, I think he would be estopped to deny it was not a good contract.

The Referee: The question is not whether he secured a contract, because the Beverlyridge Company recognized it and conveyed the property to him.

Mr. Andrews: They might have under the mistaken idea that Mr. Oswald was going ahead with it.

Mr. Blair: If they have a binding contract they can enforce it. Whether they go through with the contract is another proposition.

Mr. Andrews: That is a question. The letter says: "When this deal is completed." Does it mean when Mr. Oswald goes on with the contract or does it mean just getting the signature of Mr. Oswald? The letter does not say that. It says "When this deal is completed."

The Referee: But they did actually convey the property.

Mr. Andrews: Yes, but in the meantime Mr. Oswald refused—they deeded this while they were still negotiating with Mr. Oswald to go on, but he never did construct all the work on that tract. He stopped work on that contract and therefore, your Honor please, we would have had a right, if nothing was done, to obtain the property back from Mr. Castle. That is the first claim I would make.

We are not estopped—because we deeded him the property and the deal never went through, our understanding was it would go through, so we have the right to rescind, as far as that is concerned.

Then the second proposition is the latches. I don't think it is clear enough in either of these contracts, but the deal was consummated when the work was actually done.

The Referee: The contract of December 14, the agreement to convey, is rather substantial evidence that they were satisfied with his services.

Mr. Andrews: Yes, the testimony will be that at that time Mr. Stone believed Mr. Oswald was going on with it.

The Referee: Any further questions, Mr. Blair?

Mr. Blair: I don't think so.

The Referee: What about the question raised by Mr. Andrews, that the property was conveyed and he could have secured it by payment of the release price?

Mr. Blair: The improvements were not put in, which was not his fault, and the only thing he would take it subject to was the release price, and they lost the prop-

erty through their own failure to pay the trust deeds covering all the property, and I don't believe so far as I am concerned that they ever obtained a map or plat showing the lots to cover it.

The Referee. There is nothing in the agreement I can see about conveying that says anything about improvements.

Mr. Blair: No, it does not say anything about improvements.

The Referee: If he accepted this contract as is, without anything in it about improvements—

Mr. Blair: But the other contract, there was a contract to do the work and deliver the lots accordingly.

Mr. Andrews: Where?

Mr. Blair: The contract of the 19th of November between Oswald and the Beverlyridge Company, which speaks for itself.

Mr. Andrews: But he has nothing to do with that.

Mr. Blair: It would be an element of damages, in other words, if the work was not done.

Mr. Andrews: Why?

Mr. Blair: He was to have the lots there which were to be improved, and the manner in which he was to pay was the release price.

The Referee: But there is nothing in this agreement with him about improving the lots.

Mr. Blair: Not in the agreement between Castle and the trustee. However, the other agreement was between Oswald and the trustee, which was entered into prior to the agreement between Castle and the trustee.

The Referee: But there was no proof though that the bankrupt agreed to convey this property to the claimant

with the improvements in it. As a matter of fact, he accepted it, if I understand it correctly, at a time when the improvements were not there.

Mr. Blair: Yes.

The Referee: And in his conveyance there is not a word said about improvements.

Mr. Blair: That is true, but I think I can show by oral evidence it should be in there.

Mr. Andrews: You certainly can not.

Mr. Blair: It does not change the terms of this written contract in any respect.

(Witness continuing.)

Q. (By Mr. Blair): Let me ask you this Mr. Castle: Was it ever brought to your knowledge in any way whatsoever there was a map or plat of this property recorded in the County Recorder's office?

Mr. Andrews: That is objected to as incompetent, irrelevant and immaterial whether it was ever brought to his knowledge.

The Referee: Sustained.

Mr. Blair: I wish to make an offer at this time to prove that no notice whatsoever was ever brought to this claimant that any map or plat covering this property in this claim was ever filed or recorded in the County Recorder's office of Los Angeles County.

Mr. Andrews: Well, as to any notice being given to him, that is absolutely immaterial.

Mr. Blair: You can make your objection, and I want a ruling.

The Referee: Objection sustained .

Mr. Blair: Exception.

(Witness continuing): I had a conversation with Mr.

Stone with regard to recording an instrument covering this property sometime after I had gotten the letter. I will say about February, 1926. The conversation took place on the street at the entrance of the Wright and Callendar Building. Mr. Stone said that he had been unable to record this plat up to that time and that I would be notified, that I had to give a release on my lots by metes and bounds before they could record the plat. Nothing else was said except that I would not have to pay my release price until their map was recorded. Mr. Stone said that the map had not been recorded up to that time and I could not pay my release price. Mr. Stone and I discussed several times me getting these lots. Mr. Stone explained to me I would have to have these lots—I would have to pay the $1600 per lot after his map was recorded and that I would be notified before it was recorded. These conversations were in 1926 after he had given me this agreement of December 14, 1925. He never notified me that the map had been recorded. I never signed any map to be recorded. I did not ever give any release to the property that was mentioned in the contract. I never gave anybody authority to sign a map to be recorded.

Cross Examination

By Mr. Andrews:

(Witness) I am a real estate man. I had not had anything directly to do with the Beverlyridge before November 5, 1925—I mean by that other than talking to Mr. Stone in regard to an improvement contract. I had nothing to do with the selling of the lots. I had sold lots near the Beverlyridge—I mean in Beverly Hills as

a city. The nearest lot I sold to the Beverlyridge tract was in the Beverly Crest tract, a tract very similar to this, I would say a half a mile or a mile—not to exceed a mile. I sold one lot in the Beverly Crest in about December; that was a year after this. I had not up to the time I took these lots ever sold any lots there for the Beverlyridge Company or in any surrounding territory nearer than two miles and these lots were on the flat. I sold lots in the Beverly Hills Heights tract prior to this contract and after. The Beverly Hills Heights tract is south of Wilshire between Wilshire and Pico, but there is a hill in the tract and the lots are on the fill. I would say the tract is a mile and a half or two miles from the Beverlyridge Tract. I would say I sold about fifteen lots down there. I had sold one hundred lots south of Pico, all of which were on a slope.

I saw Mr. Oswald after I got this letter and I got Mr. Oswald to come to see Mr. Stone. The only paper Mr. Oswald and Mr. Stone signed was the one you know of and that I have identified here. An effort was made by Mr. Oswald to do work under the contract.

Q. Any work done under the contract?

A. Mr. Oswald called for plans and profiles.

Which answer was stricken upon motion.

(Witness continuing.) I think I entered into this contract and was deeded the property early in December, or the latter part of November, 1925. I recorded it on February 9th. I knew the condition of the property when I took this deed.

Q. You knew there were two trust deeds, one for $350,000, and one for $250,000 against the property?

Mr. Blair: I object to that as immaterial whether there was a million dollars on there.

Mr. Andrews: This is on the question of la*t*ches.

Referee: Objection overrule*s*.

(Witness continuing) I knew of these two trust deeds. I knew they were on record, and I was a real estate man. I did not before I made this contract and accepted this property read over the trust deeds. I was only told they were there. I did not know as a matter of fact. But I knew they were there. I did not see them recorded. I knew that the Beverlyridge Company was not in A-1 financial condition. I loaned Mr. Stone of the Beverlyridge Company $880.00 to pay their running expenses in November, 1925. I think the money was loaned after the letter of November 5th.

No, I did not at any time tender to the Title Insurance and Trust Company, or any other party, the release price for either of these lots. Mr. Stone told me at the time that I could not pay this release price until he had paid his release price on that particular property and had recorded his map, and when that was done he would notify me. Mr. Stone told me that in February, 1926. I had not made an effort to pay the Title Company or any other Company this money prior to February, 1926. Mr. Stone told me at the time he had given me this letter that I would have to return my contract before he could record his deed on the property, before the Hogan Finance Company could give him a deed to this property. This conversation was in December. All of these conversations took place in December, January and February. I couldn't say whether or not this conversation took place in the first or latter part, but it was during December.

There was something said about the contract I signed.

Handing the witness Claimant's Exhibit 2, being the letter of November 5th, 1925, witness continued:

That was written to me by Mr. Stone after we had certain negotiations and in the letter Mr. Stone said he would deed me $25,000 worth of property in Beverly Ridge. I was to pay the release price on the lots taken, running between fifteen and sixteen hundred. This letter was accepted by me and I agreed to those terms. Thereafter, the contract, Exhibit 1, was signed by Mr. Stone and me. That was the consummation of the letter, and I understood it to carry out the terms of the letter. Before the signing by Mr. Stone and me of the contract and deeding that property to me there was a contract drawn up between Mr. Oswald on the one hand and Mr. Stone and a number of people to sign which has been offered in evidence. I took part at that time in the negotiations for that contract, not in signing them. The terms were discussed before me. At the time the proposed contract was drawn copies were submitted to me and to Mr. Oswald and Mr. Stone in Mr. Westervelt's office and we all read them over. I was in a casual way familiar with the terms of the Oswald contract. I don't know whether I read the entire contract. I don't remember whether a contract was handed to me to read but I was familiar—I knew there was a contract there, however, I couldn't say I read the contract. I was there when the terms were discussed. I was present when the contract was signed. It was signed by Stone, Oswald and Mr. Westervelt. The contract was read over before it was signed by Oswald and Westervelt and Stone. I don't know that I read a copy too.

The witness being handed the contract and directing his attention to paragraph 5 on page 3 of the contract: "Said first parties (that is the Beverlyridge Company) represent that they are the owners of said property and that the only encumbrances and claims against said property are as follows:" stated:

That is the property in which these lots were deeded to me. I knew that it mentioned a trust deed in the sum of $220,000 and secondly a trust deed in the sum of $320,000, and that the third one is a mechanic's lien and attachments not over $30,000, and I knew that approximately 73 lots or 17 acres of said property which had been sold for the sum of approximately $612,690.

Then also the next paragraph: "Said parties of the first part (Beverlyridge Company) further represent that they own all of said described land, except as notes in subdivision D of this article, and that each of the trust deeds described in subdivisions A and B contain a release price which together permits them to obtain clear title to any portion or part of said property, by the payment of a sum equal to $6,190 per acre." The witness stated:

I knew that and I knew that my lots were part of those lots. I also knew that this deed which was given to me by Stone contained a description of my property by metes and bounds. I knew from Mr. Stone's letter that by a payment of between fifteen and sixteen hundred dollars as set forth in the letter would clear any of that property. I did not know to whom it was to be paid. I knew there was a trust somewhere but I didn't know where. I did not make any effort to find

out because I was going to be notified when they recorded this and I was ready to pay my money at any time. I had arrangements made to pay my money any time. I told you this morning the first time I was told by Mr. Stone about being notified was sometime in January or February. I said I would be notified by Stone. I did not testify this morning that I had no conversation about this notice business. I told you, in December, January or February was the first conversation I had about the notice. I did understand there was a release price when I took the lots. I did know this was all under a trust deed; that is why I could not pay my release price, because it was not recorded and that is the reason I did not pay the release at that time. I could not until Mr. Stone had recorded their map. The subdivision plot of the second unit was not recorded. At the time that he have me this contract Mr. Stone said that he had a different agreement with the sellers of the property; that I could not pay the release price on these lots that I had obtained by metes and bounds until a map was filed. After the foreclosure by the Hogan Finance Company of the trust deeds I did go to them and try to make arrangements with them for the purchase of the property. I tried several times to make a deal with Mr. Beyers on the lots. Mr. Beyers offered me several propositions on lots and several times I was talking with Mr. Greenberg and I imagine—I am sure I did tell him I would pay the release price on these lots if I could get them, but at all times I had a deal and I did have for five or six months after that on the lots, but we never could seem to get to terms.

On some of Mr. Beyers' lots, some of the Beverly Ridge estate lots. I understand they foreclosed in April. It seems there are some lots Mr. Beyers holds in the bankruptcy, lots that are clear of any encumbrance. Mr. Beyers and I went up to see the property and he offered me certain lots there subject to certain encumbrances to wipe my claim out, but I didn't want to accept the deal the way he could sell the lots to me, so we never did do anything. This happened after bankruptcy. Before bankruptcy I gave Mr. Stone $3500.00 to release the Oswald claim against the Hogan Finance Company. I can't remember dates, but I think it was in June prior to bankruptcy when I gave him the $3500, as at that time we thought we were going to buy this property. A bunch were going to take it over. I don't recall that in February 1926 I came to Mr. Beyer and asked him about the contract and my deeds and Mr. Beyer told me to put them all on record and pay the release price and I said I would, because I understood it distinctly that they had to record that map. I do not recall Mr. Beyer having given me the advice. He might have, but I don't recall that in February, 1926, long before bankruptcy, and before I put my deed on record, that I went to the Beverly Ridge offices and there saw Mr. Beyer and showed him *by* deed and asked him what he would suggest doing and he told me to protect myself and pay the release price and put my deed on record, and I said I would and put it on record. I did put my deed on record in February, 1926. I think the Hogan people started their suit to quiet title to all these lots. I never saw their deed. I was joined as a defendant in that suit. I think I was served.

I never gave them a quit claim deed to these lots. I don't think I contested their suit and I never gave any quit-claim deed. I do not know about the contents of the complaint. I think I was served personally with a copy of the complaint.

CHARLES STONE, being called on behalf of claimants, under Section 2055 *C. C. P.*, testified as follows:

No maps were duly recorded covering the property which I had contracted to convey to Mr. Castle. I do not remember the date that the notice of default was served upon me by the Hogan Finance Company under the trust deed. The property was actually sold out under the trust deed. I presume, but I do not remember the details of it, that they served notice of default and demanded payment.

By Mr. Beyer: The sale was held on April 24, 1926.

By Mr. Beyer: The notice of default was filed approximately four months before that time.

Mr. Beyer (continuing): The notice of default of the Hogan Finance Company was November 4, 1925, and at that date they were in default.

It was here stipulated by counsel that they were in default on November 4, 1925, and the default bears that date; and that the bankrupt never did after that time redeem or relieve themselves of that default.

Cross Examination of Charles Stone.

By Mr. Andrews:

I did have a conversation with Mr. Castle as to whether I waived default on this before I signed the deeds with him. I told him the exact condition of the company, I told Mr. Castle and I told Mr. Oswald. By

"exact condition of the company" I meant that we would not be able to go on with the property until we get a contract to prove the property and to carry out the improvements. He knew the details of the whole thing and about whether there was a default on the trust deed. He loaned the Beverlyridge Company $880 in different sums. He knew about the situation of the company or I would not have had to borrow the money if I did not need it. I never repaid him any of it. These loans began in November, 1925, and ran along I think until sometime in January or February, as I remember it. The map of the second unit was not filed. The engineering work was done on it and the profiles were out and the metes and bounds were all calculated and the lots and tract was all laid out and we sent it to the city for recordation but we did not have the money to pay for it. This was known to Mr. Castle. We even got a tract number on it. The city of Los Angeles gave us a tract number on it but that was as far as we got.

Witness, being handed contract, Exhibit 1, stated:

These tracts are described by metes and bounds. We could only describe it by metes and bounds because the map was not recorded. Mr. Castle understood it. I told him that. I submitted to him the description by metes and bounds. We had the engineers stake it out and calculate in order to get the metes and bounds. Mr. Castle knew that because he had to wait several days for that. He agreed to take the property as it is there described. Mr. Castle knew that the escrow was up to the Citizens Trust and Savings Bank. He saw the instructions and he was there a good deal at that time. I think I told him where the release price would be paid.

The time the Oswald contract was signed it was in Mr. Blair's office, along in the evening between six and seven o'clock, and Mr. Castle, Mr. Oswald, Mr. Blair and Mr. Westervelt and myself were there. Everybody saw the trust deeds before they were signed, including Mr. Castle. There was several copies and I think Mr. Castle read one. I could not say that it was read aloud. I did not tell Mr. Castle not to pay his release price because we were going to file the map and wait for us to file the map before he paid the release price. I am positive of that. I did not tell Mr. Castle not to put his deed on record. I did not tell Mr. Castle not to pay the release price and get possession. I did not tell him that I had been unable to file the plat up to that time and that I would notify him when I did. I did not tell him at any time that I would notify him when I filed the plat so he could pay the release price.

Re-Direct Examination of Mr. Stone.

By Mr. Blair:

I knew that I would have to have Mr. Castle's signature to the map before I could record it, or else a quitclaim deed from him to the property I had agreed to convey to him, but I did not have any conversation with him where I told him I would take it up with him and get another deed in exchange for the quitclaim deed. I knew somebody would have to get in touch with him before I could record it. I thought that was a fact. We had an arrangement in the declaration of trust whereby a portion of the property could be sold before the map was recorded. Any portion of Unit No. 2, without any

streets being dedicated or anything. My agreement with the Hogan Mortgage and Finance Company was so much per acre, which, after we recorded it would be worked out on a lot basis. It was to be after we recorded it. I did not know prior to the time I recorded the map what the lot basis upon the release price would be. There was an easement there for streets before the map was recorded. We knew how much area was cut up into lots and how much area was going to be cut up into streets before the map was recorded. We knew before because we had already recorded the map on the first unit and had excavated for the streets, and I knew that the City Planning Commission would not allow us to widen those streets, and they would have to be uniform in there. I knew approximately the length of the streets. I could not tell what they were offhand but we had a profile on the entire property made by Mr. Ballinger, and that had all been worked out. That did not show the exact area of the streets to be taken out of the second tract to be subdivided. We did not know the exact area and how many square feet because we had not at that time determined the extent of the second unit. The exact release price per lot could have been done on an acreage basis. We had an agreement in the original agreement with the Hogans on the release price of the property, that it was first worked out per acre, and then it was to be worked out afterwards, after the map was filed on the unit for so much per lot, on the basis of so much per acre, so it would have taken in the streets. It was figured on the whole. There is always a possibility that the county might require us to relocate the streets. As a result, if

we were required to relocate the change would not be on the width of the streets but the contour might be greater. You don't get this, Mr. Blair, if you did you would see it in a minute. In that agreement with Hogan that matter was worked out in an acreage basis regardless of streets. They did not consider streets. They wanted so much per acre and it did not make any difference as to the streets. There was one hundred and eleven and a fraction acres of land there and that was worked out at so much per acre and the streets would have nothing to do with it, would not apply at all. They were not going to let us off because we put it into streets, so it would not make any difference. The release price I made him on the lots was big enough to cover all those contingencies. I do not remember the exact release price to the Hogan Finance. It was in the neighborhood of $6000 I think. The release price per lot to Castle was sixteen hundred and some odd—sixteen hundred dollars as I remember. I would say I conveyed to Mr. Castle in the neighborhood of four lots. That is the way we cut that up on the first unit. The release price on the lots would not vary according to the amount in area we took out of the tract for street purposes, becauses if I took it out of the streets I would have to put it in the lots.

Re-Cross Examination of Mr. Stone.

By Mr. Andrews:

The excavations for the streets in the second unit had that time in December been already made and Mr. Castle was shown the property and he agreed on the property. It would have been possible for Mr. Castle to pay the release price and get a deed to those lots at the time I

gave him the contract on the metes and bounds description. I could not give him a deed because he had not paid the money. I did not have the money to pay it with, and in that agreement he was to pay it. It was in trust in the Citizens Trust & Savings Bank and they issued all of them. I think I am correct in stating that there was an extension to the trust deed referred to in the contract with Oswald, paragraph seven. I think we got an extension but I am not sure. I did not receive any notice from Mr. Oswald with regard to any election on his part to cancel the contract, or consider it void. He did not do any work under the contract. We received a letter asking that the wives of the partnership join in this contract. That is the only thing I remember of, with reference to any documents as to why he did not do any work. I went out with Mr. Castle a couple of times and went out there with Mr. Westervelt two or three times, and went out there once or twice myself (to Oswald's) and asked him to proceed with it and he did not. I had a conversation with him in the presence of Mr. Castle. In those conversations Mr. Oswald said he was prepared to proceed, but never did. It is my impression that we got a six months extension of the trust deed and I delivered to Mr. Blair a letter dated November 19, 1925, in which the Hogan Finance Company agreed to an extension of time for the payment of that first trust deed to January 19, 1926.

Mr. Beyer (volunteering) That was extended and the trust deed never foreclosed, the first trust deed on it. That is the one referred to in the contract. It was never foreclosed.

(Witness continuing) We never delivered to Oswald the maps and profiles approved by the City of Los Angeles to do the work. Referring to the agreement between the Beverly Ridge and the Hogan Finance Company, of which the Citizens was the trustee, witness continued: If my memory serves me correctly, the release clause is not in that contract—I think it is with the Citizens Trust.

RICHARD CASTLE, being recalled for further direct examination, testified as follows:

I did have a conversation with Mr. Stone with reference to delivering me a deed on that property. During the month of November Mr. Stone told me the lots I had selected could not be delivered to me at that time, that there was a release price to be paid on the entire acreage on the second unit and when that was paid he could deliver me a deed to those lots and I would then pay the release price, and that is why I never did offer the release price. I was told by Mr. Stone and Mr. Westervelt during the month of November, or about the time that this contract was written that I could not get the lots at that time.

Cross Examination.

By Mr. Andrews:

I was told in November that at that time if I paid the release price I could not get a deed. I was told I could not before this contract was written or this agreement that Mr. Stone gave me. I yet signed an agreement to take these lots and I accepted this proposition to take them after that or later. He could not give them but he was going to pay the release price and record the second

unit; as our contract covered the entire tract and not the second unit, and when it was paved, or when it was recorded rather, then I would get my lots. That is why I did not pay the release price at that time.

CHARLES STONE, being called for further direct examination, testified as follows:

I never had such a conversation with Mr. Castle that sometime in November I told him that the lots he had picked out in the second tract he could not pay the release price on. I never had any such conversation as he stated.

Cross Examination.

By Mr. Andrews:

I was never in a position to give him a deed if he paid the money, but the Citizens Trust & Savings Bank could. I would say that it was less than an acre. I read the declaration of trust many times.

JOHN D. BEYER, called as a witness on behalf of the trustee, being first duly sworn, testified as follows:

In February, 1926, I was employed by the Beverlyridge Company. I was in the office at the time in an advisory capacity. In the month of February, 1926, Mr. Castle came to the office in the early part of February and discussed with me the matter of the possible refinancing of the Beverly Ridge and what he had better do with his contract, with his commission, as he called it. Mr. Castle asked me what to do about his particular lot and I told him the best advice I could give him was to record it and make it of record and then go down and see Winchell about it. Mr. Winchell is a trust officer of the Citizens Trust & Savings Bank. He had the trust

on the Beverly Ridge. Castle and I discussed Mr. Winchell several times. We discussed the Beverly Ridge affairs and Mr. Winchell's connection with them. I didn't know particularly who Winchell was or didn't describe him particularly, except I knew he was the Trust Officer of the Citizens Trust & Savings Bank who had the trust on the Beverly Ridge. Mr. Castle didn't say anything to me about knowing from whom he could get the deeds to his property. I did not discuss the matter of the release price with Mr. Castle, except I remember that once, early in February, we did discuss the release price. He asked me if I thought the release price was a reasonable one and I told him that was about what the company had to pay the bank, that there was no way of getting under that amount. I remember I told him I did not know the exact amount of lots coming to him but we discussed the lots, three or four lots, and came to figure it up and it was about sixty-three or sixty-four hundred dollars to pay the bank, and I told him that was the least he could get out of it for. I knew the condition of the property in November, 1925. Some of the excavations, most of them, had been made on the property for the second unit and part of them on the third unit. I do not know whether or not, after these excavations were made Mr. Castle picked out the property he wanted. I don't know whether Mr. Castle went over on that property and saw the property he wanted. I don't know what he did before the several trips with myself—he has been up with me but I don't know of any previous trips. He was up with me after the bankruptcy.

The following letters were received and admitted in evidence as Trustee's Exhibit A:

"December 21, 1925.

Mr. Charles Stone,
Beverly Ridge Co.,
Wright & Callender Bldg.
Los Angeles, Californis.

In re. Oswald Improvement Contract.

Dear Mr. Stone:

Mr. George Oswald has requested that I communicate with you in regard to the following matters:

If you have secured the signatures of the parties of the first part to your contract with George H. Oswald, will you kindly forward the same to me.

Will you also kindly forward the plans and profiles, and obtain the permits necessary to do the work and forward copies of the same to me, so that I can immediately take the matter up with Mr. Oswald.

Yours very truly,
GEO. D. BLAIR."

"January
fifth
1926.

Mr. George De Lany Blair,
711-17 Security Building,
Los Angeles, California.

Dear Sir:—

Your letter of Dec. 31st with reference to the Oswald improvement contract, received.

We have obtained the signatures of all of the parties to the contract with the exception of one, which will necessitate a trip to Santa Monica on the part of the writer and this will be done at the first possible moment.

The contract which we are to deliver to you will supplant the original contract which was signed by the writer under a trust agreement and power of attorney for all the partners of the Beverly Ridge Company.

Plans and profiles are in work and in the city's hands. Permits will be issued in the next day or so, so that Oswald Bros. can proceed immediately

with the improvement work. Copies of these plans are now in the hands of our engineer and I am directing him today to deliver these plans as far as they are completed to Mr. Oswald.

Sufficient grade stakes are set on the dirt excavations so that shovels can begin work immediately These have been in place for some time in accordance with my telephone message to you in November, so that this part of the work has been ready for some time. Excavation work should have started some weeks ago. We have an arrangement made wherein the plans for the work will be kept ahead of the improvement work.

Trusting that this gives you the information desired and with kind regards, I remain

Yours very truly,

BEVERLYRIDGE COMPANY,

Charles Stone

CS:F Managing Director."

"January 23, 1926.

Beverly Ridge Co.
202 Wright & Callendar Bldg.
Los Angeles, California
Attention, Mr. Stone:

In re. Oswald Improvement Contract.

Dear Mr. Stone:

On December 21st I wrote you and inquired if you had secured the signature of the parties of the first part to your contract with George H. Oswald. A few days later, I saw you at Mr. Castle's and you stated that you expected to have all the signatures within a day or two. As yet, I have not received the contract.

Mr. Oswald has informed me that the plans and profiles and necessary permits to do the work have not been forwarded to him.

I would like to call your attention to the fact that Mr. Oswald is contemplating the undertaking of other large contracts in the near future, and as a result would like to know if the above matters have been taken care of, and if not when they will be.

Mr. Oswald feels that if this matter is not taken care of within the next few days, He will have to refuse to accept the contract.

Yours very truly,

GDB MER GEO. D. BLAIR"

Direct Examination

GEORGE H. OSWALD, called as a witness on behalf of the claimants, being first duly sworn, testified as follows: By Mr. Blair:

(Witness) I am the George H. Oswald mentioned in that contract which has been introduced in evidence, dated November 19th. I have examined that contract and my signature is attached to it. I was ready, able and willing at all times to go on and complete the work as set forth in the contract under the terms and conditions of the contract. At the time the transaction took place with regard to the signatures on the contract, the night the contract was signed, there was Mr. Blair, Mr. Stone, Mr. Westervelt, Mr. Castle and myself present, and we signed that contract and Mr. Stone said he had authority to sign these other names—he said he was a partner and that he had authority to sign their names, he had the power of attorney to sign their names and that what he did was all right, and then Mr. Blair asked him to get the other names if he could, and he said yes, he could get those but we would go ahead with the deal as it was signed. We did not go ahead with the deal because of the fact that he did not produce the plans and specifications and permits. I asked him not once but dozens of times to get the permits. I sent Mr. Castle out there several times to get the permits. I have been in the paving business a number of years.

It was here stipulated that Mr. Oswald had the financial ability to comply with the contract if he wanted to.

(Witness continuing) I do several million dollars of work each year and have been in the business fifteen years. The reason I did not go ahead with the work was on account we did not have the plans and specifications to go ahead. The city demanded those. We did not know if we did not have the plans whether they made an inch cut or four feet. We did not know what to do. The permits were never delivered to me.

Cross Examination

By Mr. Andrews:

Q. Now, were the grade stakes on the property,

A. I don't know. No, sir.

Q. Are you sure of that,

A. Yes. Now, just a minute here. There is three sections that the contract called for us to do. Or we will say three units. They had some stakes in the first unit but they did not have no grade sheet for them and no plans for them. We agreed in this contract that we would agree to begin work within ten days. Just by hearsay I knew the financial condition of the Beverly Ridge Company at the time I signed the contract. I had loaned them $300 to pay telephone bills just before this. They said the telephone service was cut off and I loaned them $300. I did not go into details with them. I could not do anything for them. I didn't know where the stakes were. He told me lots of things. I don't know whether or not he said he could not get the permits because he did not have the money for it. The only thing

he told me in regard to the money matters, as far as that was concerned, was that the telephone was cut off because he could not pay the bill. In general conversation they all said that it was necessary for some work to get started before he could sell any lots. Mr. Blair was my attorney during all of that time. I presume Mr. Blair wrote Mr. Stone under my instructions. I do not know whether I saw this letter (23rd of January, 1926) before it was sent. I don't know whether I had a conversation with Mr. Blair before it was sent. I told Mr. Blair to take care of my affairs and he generally does.

On being read a portion of the letter of January 23, 1926, the witness *t*ontinued:

I told Mr. Blair to see if he could not get the matter straightened out and go ahead with it. I would not say that I refused to accept the contract unless the signatures were obtained. I presume that Mr. Blair was representing me when he wrote that letter (of January 23rd, 1926).

Q. As a matter of fact you never did at any time after that receive the contract signed with the other names, did you?

A. There never was supposed to be another contract. I said Mr. Blair asked if he could not get the others in and he said yes he could do that if he wanted to do that. There was around five or six hundred thousand dollars involved in all this work.

Q. Would you have gone ahead with this without the signatures on the contract?

A. When I signed the contract it was all right and I would have gone ahead with it if we had got the stakes. I did not read the letter that followed that last letter of

Mr. Blair, the letter written by Mr. Stone. To my recollation I never saw it. I was never advised by Mr. Blair that Mr. Stone said he would try to have a new contract drawn up which would satisfy me. I never heard what was stated in that letter. I was present when this contract was signed and heard the conversation between Mr. Stone and the rest of us and Mr. Stone said he had authority and the power of attorney to sign these names, but as far as the contract was necessary, I did not have to have the other names, but Mr. Blair said then it would not hurt to get them. That is all the conversation, and Mr. Blair asked if it was all right with me and I said "fine and dandy" and I signed the contract. I read the contract before I signed it and I saw the provisions that they owed two big trust deeds. I knew they were in default on those trust deeds. I did not know that they had no funds whatsoever. I knew at that time that they did not have enough funds to pay their telephone bill. That was sometime later than when the contract was signed. I don't remember Mr. Stone telling me that they were not selling any lots at that time, that sales were stopped I did not know of them having any finances whatsoever. I did not know of Mr. Castle lending money to Mr. Stone for the company. We went into the matter of the company's financial standing before we signed the contract, Mr. Blair and myself. If I could explain, these affairs are all alike, very seldom own the land; they are all drawn up about the same as this, pretty nearly all of them, and that is one of the reasons we take a little more chance and we add a little more money to it than to a cash proposition. Every other detail is like this, they never owned the land, and take *c* chance of

selling it out. At this time there was a boom going on in this district and ninety-nine out of one hundred times this deal would go through to one it would not. I have other similar contracts going on right now under the same conditions as this one. We look into the cost of the land and where the property is situate and so on.

Mr. Blair and I looked into the financial condition before we signed the contract. I don't remember offhand what we found.

Q. Then if they were penniless, practically bankrupt, owing two trust deeds in default, amounting to over $600.00, you say you knew that and expected to go ahead?

A. Well, I signed the contract—I was a darn fool or something or I would not have signed the contract. There was my signature to go through with it, and whether it was a bad deal or a good deal I don't know. I did not instruct Mr. Blair I would not go through with it unless they signed with certain signatures. Mr. Blair was my attorney and still is.

GEORGE DE LANY BLAIR, called as a witness on behalf of the claimants, being first duly sworn, testified as follows:

My name is George D. Blair. On or about the 19th day of November I called at the office of Charlee Stone in the Wright & Callendar Building with reference to a proposed contract between George H. Oswald and Mr. Stone. I think I made at least two or three visits to his office. Mr. Stone informed me that they had, I think it was on one Saturday just approximately the time this contract was signed, sold some forty odd thousand dollars worth of property there and that if he could get this

contract signed by Mr. Oswald he would then be in position to immediately go ahead and make a complete success of the property. This was in the presence of Mr. Stone and myself. I made investigations about that time as to how the title of the property stood through Mr. Stone and through the bank. I believe it was the Citizens Trust, and as I recall I examined the papers to see the title. I believe I found title stood in the names of all these parties to the agreement—no, I believe it stood in the name of Charles Stone—that is so long ago I don't remember. I believe it was brought to my attention the matter was in the hands of Charles Stone, as trustee.

At the time, on the 19th of November, the time when this contract was signed in 1925, Mr. Stone, Mr. Westervelt, Mr. Oswald and Mr. Castle came to my office. At that time when the contract was signed I asked Mr. Stone what authority he had to sign this contract for the other people. Mr. Stone said to me, "I am the trustee. It is a partnership and I have the power or attorney to sign all the signatures of all the individuals." I said to Mr. Stone, "I assume that the contract will bind all of the parties, but will also bind Mr. Oswald. I would like to have the signatures, however, of all the wives thereto so there would not be any question because your power of attorney might have been revoked by some and filed of record, which I could not tell without checking the record." He said, "All right, I will endeavor to get it." However, I want a contract signed now so I can put it in the paper and advertise it that Oswald has entered into the contract to do the work," so I said "All right," and I told Mr. Oswald at the time, "This is a dangerous contract," and if you take this contract you will have to

keep yourself in a position to purchase this land or assume the liabilities and responsibilities in the event the Beverly Ridge people fall down, that is, if you want to protect yourself after you have worked on the job." Mr. Oswald said he understood that and the contract was signed by Mr. Oswald and also signed by Mr. Stone at that time. This was in the presence of all the parties. On several occasions after the signing of the contract I asked Mr. Stone, I think at least two occasions by telephone, in each of which I recognized his voice on the other end of the wire, about obtaining the permit to do the work and plans and profiles, and he said he would get them.

Cross Examination.

By Mr. Andrews:

In the transactions between Mr. Castle and the Beverly Ridge people Mr. Castle conducted his own affairs. He might have suggested things to me but never consulted me as attorney and I did not take up these things with him until after the contract was signed. I went into the financial condition of the Beverly Ridge Company before this contract was signed with Mr. Oswald in a general way and as near as I could, but I had to take the word of Mr. Stone on practically everything. I ascertained there was a trust deed in which the Citizens Trust & Savings Bank was trustee and that they were holding the property subject to two trust deeds of the Hogan Finance people involving about $600,000. I was told by Mr. Stone, as I recall it, and I think I tried to verify it at the bank, that this encumbrance was against the property. There was

one trust deed, as I recall it, about due and we felt there should be an extension of time in order to enable the Beverly Ridge people to go and sell some lots and get some money in. I think I inserted in clause five the money and interest due, but I do not believe they were in default at that time. If they were in default and I did know it I asked for an extension of time so they would be protected. I think they told me it was a partnership and Valentino was in it and they were going to get money from him. I did not look very much to that, but the real property itself, figured it out if the Beverly Ridge failed here Mr. Oswald may have to come in here and put up a million dollars and venture maybe in the real estate business, but he could work it out. I did not know in order to protect Mr. Oswald I had to have the wives sign. Mr. Stone told me he had authority to bind the Beverly Ridge. I wanted to get everything I could naturally. Mr. Stone told me he had authority to bind everybody and I took his word for it. I wrote him a letter.

Witness being shown a letter of December 31, 1928, (Trustee's Exhibit A) continued:

Yes, I wrote it.

CHARLES STONE, recalled for further examination, under Section 2055, testified as follows:

I am the person who signed this agreement as trustee —trustee for the Beverly Ridge copartnership. I became such trustee by a trust filed at the Title Insurance and Trust Company. The copartners of the Beverly Ridge signed it. None of the wives signed it; just the co-*partnersh* signed it. The property had all been purchased and the trust was formed afterwards. I was

made trustee afterwards for all the parties buying the property, and I had authority to buy and sell this property.

The Referee: I don't see how there is any escape from the conclusion that if these other parties were necessary parties—

Mr. Blair: Well, have they contended they are necessary parties?

The Referee: Assuming they were necessary parties, they must have either signed themselves or by a person authorized to represent them, before there is a valid and binding contract, and if there is no valid and binding contract the fact it was signed by Mr. Oswald does not validate it.

The Referee: Well, I don't know, but you see these other parties, the wives, it is a question whether it is community property and the effect of the law of the State of California on the question of the wife of the husband to sign—

(Witness continuing) To the best of my knowledge, Mr. Arbuckle, Mr. Pratt, Mr. Stone, Mr. Westervelt and Mr. Purpus were married men. Mr. Norcross was a single man, and the ladies named in the agreement were the names of the wives of these different people. They were married at the time they acquired whatever interest they had in this property. My mind is not clear, but I don't think I obtained the signatures of the parties of that contract or assignment to it after the 19th day of November. I got all the names of the men with the exception of John M. Pratt. Evidently, there was no women signed. I was trustee for the Beverlyridge Company copartnership, and it consisted of John M. Pratt,

Frank Arbuckle, Purpus, Norcross, Westervelt and myself. I signed for them as trustee.

The Referee: As far as the Castle claim is concerned, as far as the $880 amount is concerned, that may be allowed.

It was stipulated that the value of the property con-
, was stipulated that the value of the property
.veyed to Mr. Castle was $25,000 less
,850/45,56ths of $6190, leaving a balance of
0,474 due Mr. Castle if his claim is allowed
us $880 previously allowed.

$880 if the claim is allowed.

Whereupon the Castle claim stood submitted, upon the filing of a brief memorandum of authorities and the documents.

The Oswald claim was continued to December 10th for the filing of the documents upon the legal question as to whether the contract was binding between Oswald and the Beverlyridge people or not, and if the contract is binding then evidence would be introduced as to the damages.

Upon being interrogated by the Referee, the witness STONE continued:

My interest in the property was acquired after my marriage by my earnings and not as income or issue of any profits that I owned before I was married, and not as a result of any gift, bequest or devise that came to me after my marriage. I could not say as to whether that was true as to all the other copartners.

Trustee's exhibit B is in words and figures as follows:

"AGREEMENT.

MEMORANDUM OF AGREEMENT, made and entered into

this 28th day of February, 1925, by and between, Charles Stone, Party of the first part, F. A. Arbuckle, John M. Pratt, R. W. Purpus, W. I. Norcross and James Westervelt, parties of the second part, all of the city of Los Angeles, County of Los Angeles, State of California.

WHEREAS, party of the first part has caused title to be taken, or is about to cause title to be taken in the name of Beverlyridge Company for the benefit of the parties hereto, to the following real property, to-wit:

> The W½ of the NE¼ and the NW¼ of the SE¼ of Section 11, Township 1 South, Range 13 West, SBBM

in said County of Los Angeles, State of California, excepting two certain parcels more particularly described and set forth in deed of conveyance from Beverlyridge Foothills Syndicate to said Beverlyridge Company, dated January 28, 1925, and placed by the grantor therein named in Escrow No. 16939 in the main office of the Citizens Trust & Savings Bank, Los Angeles; and

WHEREAS, parties of the second part are, with party of the first part, all of the beneficiaries for whom title to said premises is taken; and

WHEREAS, it is proposed and intended by all of the parties hereto that party of the first part shall immediately cause to be executed and delivered into said escrow for recordation under the terms of said escrow, a first trust deed for Two Hundred and Fifty Thousand ($250,000) Dollars, and a second trust deed for Three Hundred and Fifty Thousand ($350,000) Dollars covering said premises, and that said premises shall thereafter be subdivided and sold under a subdivision trust of which said Citizens Trust and Savings Bank shall be the trustee,

and which shall provide after all necessary expenses and liens, including the amounts of said first and second trust deeds with interest thereon, have been paid, that the net profits shall be divided among the parties hereto in accordance herewith:

NOW, THEREFORE, in consideration of the premises and of the mutual promises, covenants and agreements herein contained, the parties hereto mutually promise, covenant and agree to and with each other as follows:

I.

Party of the first part shall, and hereby declared that the said premises and or the net avails and proceeds shall be, under the terms of said subdivision trust, held and administered in trust for himself and the other parties hereto, and that he will cause or procure as speedily as may be, a proper subdivision trust thereof, to be executed by the said Citizens Trust and Savings Bank or some other suitable corporate trustee in which it shall be definitely provided that said corporate trustee shall divide the net proceeds or profits thereof to and among the parties hereto in accordance with the true intent, meaning and purport of this agreement.

II.

Parties of the second part hereby consent to the taking of said title as above recited, and do hereby each for himself constitute and appoint the said party of the first part his agent and trustee in the premises, and each of the parties of the second part hereby agrees for himself that he will sign, execute and deliver promptly upon request of the party of the first part, all necessary consents,

deeds or other documents requisite to be signed by him as the beneficiary of said trust for the purpose of effectuating or validating either of said trust deeds or other instruments that may be or become necessary or requisite in order to carry out the true intent and purpose hereof.

It is mutually understood and agreed that the proportionate interests of the several parties hereto in and to the said premises and the net avails or profits thereof are as follows:

Name	Amount
Charles Stone	62½%
F. A. Arbuckle	12½%
John M. Pratt	10
R. W. Purpus	10
James Westervelt	3
W. I. Norcross	2

and party of the first part hereby expressly covenants, agrees and declares that he does and will hold or cause to be held the said title as trustee for himself and the other parties hereto, and will pay or cause to be paid to each of the parties of the second part his several percentage of the said net profits in accordance with the percentages set opposite the names of the several parties hereto.

IV.

The parties of the second part do hereby each for himself make, constitute and appoint the said Charles Stone, his attorney-in-fact and the director on behalf of all parties hereto, of the enterprise hereinabove described, and empower him to make and enter into all necessary

contracts on behalf of the parties hereto to carry out said enterprise for the benefit of the said parties hereto.

V.

It is mutually understood and agreed that said enterprise shall be carried on by the parties as partners having their several interests therein in the proportions hereinabove specified, and that the name "Beverlyridge" be adopted as the firm or trade name thereof, and a certificate representing said name be filed in the office of the county clerk and published as required by law.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.

CHARLES STONE
Party of the first part.

F. A. ARBUCKLE
J. M. PRATT
R. M. PURPUS

JAMES WESTERVELT
W. I. NORCROSS
Parties of the second part.

STATE OF CALIFORNIA
County of Los Angeles—ss.

Be it remembered that on this 21st day of February, 1925, before me C. A. Sprecher, a notary public in and for the state of California, County of Los Angeles, appeared Charles Stone, F. A. Arbuckle, John M. Pratt, R. W. Purpus, W. I. Norcross and James Westervelt, to me personally known, and known to *be* to be the parties named in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto affixed my seal the day and year first above written.

C. A. SPRECHER

Notary Public in and for the County of Los Angeles, State of California.

(SEAL)

My commission expires Sept. 2, 1928.

Exhibit.....is in words and figures as follows:

"DEED OF TRUST.

THIS DEED OF TRUST, made this 18th day of April, 1925, between Charles Stone and Clara F. Stone, his wife, of Los Angeles, California, hereincalled Trustor, the said Charles Stone, herein called Trustee, as trustee of Beverly Ridge Company, a copartnership consisting of F. A. Arbuckle, John M. Pratt, R. W. Purpus, I. W. Norcross, James Westervelt and Charles Stone, which is herein referred to as beneficiary.

WITNESSETH: That Trustor hereby grants to Trustee in trust with power of sale, all that property in the city of Los Angeles, County of Los Angeles, State of California, described as follows:

Tract No. 8080, in the city of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 112 pages 9 et seq of Maps, in the office of the County Recorder of said county:

ALSO the North West Quarter of the North East quarter of Section 11, Township 1 south, Range 15 West, S.B.M in the city of Los Angeles, County of Los Angeles, State of California.

ALSO those portions of the South West quarter

of the North East quarter and of the North West quarter of the South East quarter of said Section 11, which lie North of the North line of Tract No. 8080, as per map recorded in Book 112 pages 9 et seq of Maps, in the office of the County Recorder of said County.

To have and to hold said property, subject to encumbrances now of record thereon, upon the following express trusts, to-wit:

1. To hold, sell and convey same or any part thereof and to hold or reinvest or apply or dispose of the proceeds of such sales in accordance herewith.

2. The Trustee shall have power in his own uncontrolled discretion and without the consent or any act of beneficiary, to sell, and convey any part or portion or all of the above described premises; to dedicate streets and roads; to contract for and cause to be installed pavements, sidewalks, curbs, conduits, grading or regrading upon the said premises or any part thereof, and for said purposes of any of them to charge the said premises or any part thereof or to mortgage same or any part thereof, or to execute and deliver deed or deeds of trust conveying same or any part thereof.

3. From time to time to pay to the beneficiary such portion of the proceeds of sales of the said premises or any part thereof, as may in his discretion be advisable, convenient or *sale* to withdraw from the corpus of the trust hereby created.

4. To hold the net proceeds of the sale of said premises, or any part thereof in trust for the benefit of and as trustee for the beneficiary above named;

It Being Expressly Understood and Agreed that

the title to said real property is vested in said trustee absolutely, and that said trustee has and shall have during the life of this trust, full power and authority to sell, mortgage, or convey the same or any part thereof, and that the beneficiary has and shall have no title legal or equitable in the said real property or any part thereof, but only an equitable title as beneficiary in the net proceeds of the sale of the said real property or any part thereof; and further that the trustee may in his sole and uncontrolled discretion use and apply any portion of the proceeds of sale of any part of said real property in, to or for the improvement or development of the rest or any remaining part thereof.

5. The trustee shall, within twenty-five years from date, whenever in his discretion it shall be advisable to do so, convey the portion of the premises hereby conveyed, which shall not then have been conveyed by him pursuant hereto, to the said beneficiary, the Beverly Ridge Company, or to its several members above mentioned or their heirs and assigns in proportion to their several interests as the same may then be.

IN WITNESS WHEREOF, the said Trustors have hereunto set their hands the day and year first above written.

CHARLES STONE
CLARA F. STONE.

STATE OF CALIFORNIA
County of Los Angeles—ss.

Be it remembered that on this 18th day of April, 1925, before me G. M. Harbeson a Notary Public in and for the State of California, county of Los Angeles, appeared Charles Stone and Clara F. Stone, his wife, to me per-

sonally known, and known to me to be the parties names in and who executed the foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I affix my seal the day and year first above written.

G. M. HARBESON
Notary Public in and for the County of Los Angeles, State of California.

Trustee's Exhibit C is in words and figures as follows:

"POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, F. A. Arbuckle, John M. Pratt, R. W. Purpus, W. I. Norcross, and James Westervelt, all of Los Angeles, California, being and constituting, with Charles Stone, all of the members of that certain co-partnership now doing business under the fictitious firm name of BEVERLYRIDGE COMPANY, at 201-204 Wright & Callendar Building, Los Angeles, have made, constituted and appointed, and by these presents do make, constitute and appoint the said Charles Stone our true and lawful attorney for us and each of us, and in our names, places and steads, and for our use and benefit to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, interests, dividends, and demands of whasosver kind as are now or shall hereafter become due, owing, payable of belonging to us members of the aforesaid copartnership, or to it, and to have, use and take all lawful ways and means in our names or otherwise, for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree

for the same and acquittances or other sufficient discharges for the same, for us and in our names, to make, seal and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizing and possession of all lands, and all deeds, and other assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and hereditaments upon such terms and conditions, and under such covenants, as he shall think fit. Also, to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession of in action, and to make, do, and transact all and every kind of business of what nature and kind soever, and also for us and in our names, and as our joint and several act and deeds, to sign, seal, execute, deliver, and acknowledge such deeds, leases, and assignment of leases, covenants, indentures, agreements, mortgages, hypothecations, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgment and other debts, and such other instruments in writing, of whatever kind and nature, as may be necessary or proper in the premises. And we authorize our said attorney one or more attorneys under him to substitute, and again at his pleasure revoke. Giving and granting unto Charles Stone, said attorney and his substitute or substitutes, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might

or could do if personally present, we hereby ratifying and confirming all that he, our attorney Charles Stone, or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREBY, we have severally hereunto set our hands the 28th day of February, 1925.

F. A. ARBUCKLE
R. W. PURPUS
J. M. PRATT
W. I. NORCROSS
JAMES WESTERVELT.

(Acknowledgment by all parties before C. A. Sprecher, Notary Public, February 28, 1925)

Trustee's Exhibit D is in the words and figures, in part, as follows:

THIS DEED OF TRUST, made this 18th day of March, 1925, Between HERBERT W. CARLSON, a single man, party of the first part, hereinafter called the TRUSTOR, CITIZENS TRUST AND SAVINGS BANK, a corporation of Los Angeles, California, party of the second part, hereinafter called the TRUSTEE and W. IRVIN NORCROSS, a single man, party of the third part, hereinafter called the BENEFICIARY:

WITNESSETH: THAT, WHEREAS, the maker of the note hereinafter mentioned is indebted to the Beneficiary in the sum of THREE HUNDRED FIFTY THOUSAND and no/100 ($350,000.00) Dollars, and has agreed to pay the same with interest, according to the terms of one certain Promissory note in words and figures as follows:

(The body of the trust deed contains the usual provisions).

EIGHT: It is further agreed, and as a part of the terms of this Trust Deed, by the parties hereto that a

partial Reconveyance or Reconveyances may be had and will be given at any time during the life time of this Trust Deed on parcels of one Acre or more of the property described in this Trust Deed, upon the payment of $3190.00 for each Acre released and a pro rata portion of $3190.00 for any amount more than one Acre. The sum paid shall apply on the principal of the Trust Deed Note secured hereby provided, however, that the Trustor be not in default under the terms of this Trust Deed at the time such partial Reconveyance or Reconveyances are demanded.

NINTH: It is further agreed, and a part of the terms of this Trust, by the parties hereto that the Trustor may at any time during the life of this Trust Deed, demand of the beneficiary, a full reconveyance of the remaining part of the property not reconveyed, provided however the owner of the property gives a new Trust Deed covering the property described in the full reconveyance being issued, using the new description, which new description will be taken from map or maps filed in the County Records and that portion of the property not included in the said map or maps. The new Trust Deed is to be a second lien and amount of the unpaid balance of the Note or Notes being released. The new Note and Trust Deed to bear 8% interest payable semi-annually and to expire 30 months after date of Trust Deed being released.

The release clause in the new Trust Deed shall be as follows:

"It is hereby agreed that a partial Reconveyance or Reconveyances may be had and will be given at any time

during the life time of this Trust Deed of one or more lots, which lots are portions of the property described in this Trust Deed, upon the payment of a sum which amount shall bear the same ratio to the basic release price of $3190.00 per Acre, as the property released bears to one Acre. The minimum release price for any one parcel shall be not less than $700.00. The property described by metes and bounds is to be released in the manner as described by release clause in this Trust Deed. The amount paid for the release of the lot or lots is to apply on the principal of the note secured hereby, provided, however, that the Trustor be not in default under terms of this Trust Deed at the time such partial Reconveyance or Reconveyances are demanded. After the first Trust Deed in the amount of $250,000.00 to which this Trust Deed is subject, has been paid off, the release price for each lot or lots and the price for release of acreage shall be 25% more than the amount specified above. The amount paid for the release of the lot or lots or the release of acreage is to apply on the principal of the note secured hereby, provided however, that the Trustor be not in default under terms of this Trust Deed at the time such particl Reconveyance or Reconveyances are demanded.

TENTH: It is hereby further agreed by the parties hereto that they will sign the tract map or maps, said map or maps to be subdivision map or maps covering part of all of the property described in this Trust Deed and to be filed with the County of Los Angeles for record.

This Deed of Trust shall not be effective unless PRIOR

To Its Recordation, the trust is accepted by the Trustee, under its corporate name and seal, by a duly authorized official thereof.

. . . . . .

Witness the hand of the Trustor, the day and year first above written.

Herbert W. Carlson

The foregoing trust is hereby accepted.

Citizens Trust and Savings Bank.

By Herbert C. Boehm

Assistant Trust Officer.

(Acknowledgment of Herbert W. Carlson, on the 20th day of March, 1925, before G. M. Harbeson, Notary Public, County of Los Angeles, State of California)

STIPULATION

It Is Hereby Stipulated By and Between the respective counsel in the foregoing action, that the foregoing Engrossed Statement of Evidence is true and correct, and that the Judge of the United States District Court may settle, allow and certify the same.

Geo. D. Blair

J. Gilbert Fall

Attorneys for Claimants.

Lorrin Andrews

Attorney for Trustee in Bankruptcy.

I hereby certify that the foregoing Statement of Evidence was heretofore presented to the Court for allowance within the time provided by law and that the said Statement of Evidence was settled and allowed as correct,

that the foregoing Statement of Evidence shall constitute the engrossed Statement of Evidence.

I am signing this statement in the absence of Judge Henning who is outside this District and State.

Dated this 27 day of July, 1929.

WM. P. JAMES,
Judge of the United States District Court.

(Endorsed): Filed Jul. 27, 1929, at 30 min past 11 o'clock a. m., R. S. Zimmerman, Clerk. B. B. Hansen, Deputy.

[TITLE OF COURT AND CAUSE.]

STIPULATION FOR DIMINUTION OF PRINTED RECORD

It is hereby stipulated and agreed by and between the respective counsel in the above entitled action, that in printing the Transcript of Record on Appeal the Titles and Captions of the documents therein be omitted, and indicated by a line thus: (Title of Court and Cause.) and that endorsements thereon be omitted with the exception of the Clerk's filing endorsement.

J. GILBERT FALL,
Attorneys for Appellants.
LORRIN ANDREWS,
Attorney for Appellee.

Approved this 30 day of July, 1929.

WM. P. JAMES,
United States District Judge.

(Endorsed): Filed Jul 30, 1929 at 15 min past 12 o'clock a. m. R. S. Zimmerman, Clerk, Louis J. Somers, Deputy.

[TITLE OF COURT AND CAUSE.]

PRAECIPE.

To the Clerk of the United States District Court for the Southern District of California, Central Division:

You are hereby requested to make a transcript of record to be filed in the United States *District* Court of Appeals for the Ninth Circuit pursuant to an appeal, allowed in the above entitled proceedings, and to include in such transcript the following:

1. Proof of Unsecured Debt of George H. Oswald.
2. Proof of Unsecured Debt of Richard Castle.
3. Objections to Claims of George H. Oswald and Richard Castle.
4. Opinion of Referee on Claims of Richard Castle and George H. Oswald.
5. Findings of Fact and Conclusions of Law of Referee on Claims of George H. Oswald and Richard Castle.
6. Petition for Review.
7. Order Allowing Review.
8. Referee's Certificate on Petition for Review.
9. Minute Orders of April 18th and May 3, 1929 of United States District Court affirming Findings of Referee.
10. Petition for Appeal.
11. Assignment of Errors.

12. Order Allowing Appeal.

13. Statement of Evidence.

14. This Praecipe.

Dated July 2, 1929.

GEO. D. BLAIR,
J. GILBERT FALL,
Solicitors for Appellants.

Service of above Praecipe admitted this 2 day of July, 1929.

LORRIN ANDREWS,
Solicitor for Appellees.

(Endorsed): Filed Jul 3 1929 at 20 min. past 2 o'clock P. M. R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy.

CLERK'S CERTIFICATE

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing..... pages, numbered from 1 to....., inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains full, true and correct copy of:

1. Proof of Unsecured Debt of George H. Oswald.
2. Proof of Unsecured Debt of Richard Castle.
3. Objections to Claims of George H. Oswald and Richard Castle.
4. Opinion of Referee on Claims of Richard Castle and George H. Oswald.
5. Findings of Fact and Conclusions of Law of Referee on Claims of George H. Oswald and Richard Castle.
6. Petitions for Review (Two).
7. Order Allowing Review.
8. Referee's Certificates on Petition for Review.
9. Minute Orders of April 18th and May 3, 1929, of United States District Court Affirming Findings of Referee.
10. Petitions for Appeal (Two).
11. Assignments of Errors (Two).
12. Orders Allowing Appeal.
13. Statement of the Evidence.
14. Praecipe.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the foregoing Tran-

script of Record on Appeal amount to....., and that the same has been paid to me.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this .....day of August, in the year of our Lord One Thousand Nine Hundred Twenty Nine, and of our Independence the One Hundred Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By .....
Deputy Clerk.

No. 5914

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of BEVERLYRIDGE COMPANY, et al., Bankrupt.

GEORGE H. OSWALD and RICHARD CASTLE,

Appellants,

vs.

JOHN BEYER, Trustee,

Appellee.

BRIEF OF APPELLANTS

GEORGE DELANY BLAIR,
J. GILBERT FALL,
810 Citizens National Bank Building,
Los Angeles, California,
Counsel for Appellants.

Los Angeles Review, Law Printers, 224 Court Street, Los Angeles, Calif.

SUBJECT INDEX

CITATIONS AND AUTHORITIES

In the

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of BEVERLYRIDGE COMPANY, et al., Bankrupt.

GEORGE H. OSWALD and RICHARD CASTLE,

Appellants,

vs.

JOHN BEYER, Trustee,

Appellee.

BRIEF OF APPELLANTS

By stipulation, the claims of George H. Oswald and Richard Castle were consolidated and heard at the same time by the Referee in Bankruptcy, and by stipulation and order of court they were treated as one by the United States District Court upon review, and an order having heretofore been made by this Court, the same are consolidated and one Transcript of Record filed for both appeals, together with one brief on appeal to the Circuit Court of Appeals.

Statement of the Case.

This matter comes before this court on appeal from an order upon review by the District Court affirming an order of the Referee in Bankruptcy.

The Beverlyridge Company, a co-partnership, composed of several persons, was adjudged a bankrupt. The claimant and appellant herein, Richard Castle, claiming the Beverlyridge Company was indebted to him, filed his Proof of Unsecured Debt, which claim was objected to by the appellee, John Beyer, as Trustee of the Beverlyridge Company, a co-partnership, bankrupt. In due course, the claim was heard before the Hon. Earl E. Moss, Referee. The matter was submitted and the Referee filed his Opinion, Findings of Fact and Conclusions of Law, and order thereon, in which the claim of Richard Castle was rejected, except as to the sum of Eight Hundred and Eighty Dollars ($880.00), actual cash loaned by him to the Beverlyridge Company, a co-partnership.

The claim of Richard Castle, if allowed, was stipulated to be $20,474.00, and is based upon an agreeemnt made between Richard Castle and the said Beverlyridge Company, in which the bankrupt agreed to convey certain real property for and in consideration of Richard Castle procuring a contract between the bankrupt and George Oswald for improvements on a certain subdivision situated in the City of Los Angeles, State of California, which the bankrupt was promoting. The said agreement consisted of a contract dated Dec. 14, 1925, and a letter of November 5th, 1925, to Richard Castle, which letter

was signed "Beverlyridge Company, Charles Stone, Managing Director" (Trans. of Record, pages 81 to 84, inc.), and for convenience of the court are set forth as follows:

AGREEMENT TO CONVEY REAL ESTATE

This Agreement, made this 14th day of December, 1925, by and between CHARLES STONE, as trustee under a Deed and Declaration of Trust dated April 18, 1925, and recorded in the office of the Recorder of Los Angeles County, California, on the 21st day of May, 1925, in Book 4002 of Miscellaneous Records at Page 108, party of the first part, and RICHARD CASTLE of Los Angeles, California, party of the second part,

Party of the first part, in consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property in the City of Los Angeles, County of Los Angeles, State of California, to-wit: (here the property is described by metes and bounds)

It is expressly understood and agreed, however, by both parties hereto that the deed to be executed by party of the first part pursuant hereto shall contain restrictions as nearly identical as may be with restriction (1), (2), (3) and (5) and also restrictions similar to restriction No. (4) as contained in all grant deeds heretofore executed by party of the first part conveying any lot or lots in Tract 8030 in the City of Los Angeles, as shown on Map thereof recorded in Book ..... of Maps, Page ..... in the office of the Recorder of Los Angeles County aforesaid.

It is further understood and agreed that as soon as party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the Tract which contains the above described premises, party of the second part shall quit claim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.

It is further understood and agreed that at the time of such conveyance party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain Deeds of Trust, each of which is now a blanket lien on the within described premises and other property.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.

CHARLES STONE, *Trustee.*
Grantor

RICHARD CASTLE,
Grantee.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

Be it remembered that on this 14th day of December, 1925, before me, Gertrude M. Hartman, a notary public in and for said county and state, personally appeared Charles Stone and Richard Castle, each personally known to me and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my

hand and official seal the day and year first above written.

GERTRUDE M. HARTMAN,
Notary Public in and for the County of Los Angeles, State of California.

ENDORSEMENT: Return to Richard Castle, 9116 W. Pico, Los Angeles, Calif., Compared Document —Hayes, Book-Elliott Recorded February 9, 1926, 27 min. past 3 P. M. in Book 5567 at page 250 of Official Records, Los Angeles County, Cal."

(Exhibit 2):

"November 5, 1925.

Mr. Richard Castle
9150 West Pico
Los Angeles

Dear Sir:

In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed, we shall deed to you $25,000 worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500 and $1600.

Very truly yours,

Beverlyridge Company,
CHARLES STONE,
Managing Director."

CS—am

Thereafter, upon petition, review was had before the District Court and said Court sustained the Findings and Order of the Referee (Trans. of Rec., p. 72).

It is the contention of the claimant Richard Castle that he performed everything on his part to be performed as required under the agreement, marked Claimant's Ex-

hibit 2, being the letter of November 5, 1925, supra, when he secured the contract between George H. Oswald and Charles Stone, as trustee for the bankrupt co-partnership, and that this was borne out by the evidence of the contract or agreement to convey real estate between Charles Stone and Richard Castle, supra. (Claimant's Exhibti 1, Trans. of Record, pp. 81-4.)

SPECIFICATIONS OF ERROR AS TO RICHARD CASTLE.

I.

That the Findings of Fact and Conclusions of Law Are Not Supported by the Evidence, and Are Contrary to Law, and the Court Erred in Findings:

(a) (Finding No. X) That while a purported agreement was signed by George Oswald, it was never completely executed, in that, it was not signed by all the bankrupts, nor was it signed by all the parties to this agreement, to-wit: the wives of the partners comprising the Beverlyridge Company, the bankrupt herein.

(b) (Finding No. XI) That the deal which, when completed, was to entitle the claimant to $25,000 worth of property in Beverlyridge, was never completed, and that said claimant did not perform any services for the Beverlyridge Company in accordance with his agreement.

(c) (Finding No. XII) That George H. Oswald refused to comply with the terms of the agreement which

he had signed, but which was incomplete as to the signatures of others, and that the bankrupt has received nothing of value by reason of the services rendered by Richard Castle.

(d) (Finding No. XIII) That Richard Castle is entitled to Eight Hundred and Eighty ($880.00) Dollars, which he loaned said bankrupt estate to permit it to pay certain bills and expenses, and for which he has never been repaid.

(e) (Conclusions of Law 1) That said Richard Castle has no claim against the Bankrupt estate for $25,000, or any other sum, under the agreements of November 5, 1925, or December 14, 1925, and has not been damaged in the sum of $25,000 or any sum whatsoever, and his claim for damages therefor is disallowed.

(f) (Conclusions of Law 2) That the Bankrupt estate owes to Richard Castle the sum of Eight Hundred and Eighty ($880.00) Dollars, loaned to said bankrupt estate by him to help it pay office help and expenses.

II.

That the Order Pursuant to the Findings Is Contrary to Law.

III.

That the Court Erred in Admitting Testimony Over the Objections of the Claimant.

IV.

That the Court Erred in Disallowing a Portion of the Said Claim.

V.

That the Court Erred in Refusing to Admit Testimony of Claimant.

ARGUMENT.

That the Findings of Fact and Conclusions of Law Are Supported by the Evidence and Are Contrary to Law and the Court Erred in Finding:

(a) (Finding No. X) That While a Purported Agreement Was Signed by George H. Oswald, It Was Never Completely Executed in that It Was Not Signed by the Bankrupt, Nor Was It Signed by All the Parties to this Agreement, to-wit: The Wives of the Partners Comprising the Beverlyridge Company, the Bankrupt Herein.

We contend that the agreement signed by George Oswald and the Beverlyridge Company, bankrupt, was completely executed and delivered and is therefore binding upon all the parties interested in this transaction.

1. That When Richard Castle Obtained the Signature of George H. Oswald to the Contract and Delivered It to Charles Stone, the Managing Partner, Who Accepted It and Was Satisfied With the Contract, Richard Castle Had Performed Everything to Be Performed Upon His Part, and All that Was Required of Him Was Done.

The agreement so executed by Oswald was dated Nov. 18th, 1925 (Trans. of Re., pp. 84-85), two weeks after the bankrupt herein offered this claimant $25,000 of property if he would obtain a contract from Oswald to put in the improvements in the tract the bankrupt was subdividing. The Bankrupt so treated and considered Castle's obligations performed; that thereafter on Dec. 14th, 1925, it executed its agreement to convey the property to Castle (Tr. of Re., pp. 81-3 inc). It will be noted that the agreement to convey only contains a description of the property by metes and bounds for the reason that a map or plat of the tract had not as yet been recorded in the office of the county recorder. A deed to the property at this time describing it by lot numbers would have been void as violating (Calif. Stats. 1913, p. 570), making it a misdemeanor to sell land by lot description before map is recorded. The agreement further provided that as soon as the map or plat was recorded this claimant would execute a quit claim deed of the property back to the bankrupt, and it, the Beverlyridge Company would then execute and deliver a deed of the premises to Castle. It further provided *"That at the time of such conveyance*, party of the second part (Claimant herein) shall pay and discharge the full release price necessary to secure partial reconveyance of the said lots."

Two blanket trust deeds, one for $350,000 and one for $250,000 were liens upon the entire tract, a part of which was to be conveyed to Castle, and by reason of defaults in the payments under the terms of them, were foreclosed

before a map or plat was recorded, or deed executed and delivered by the bankrupt to Castle. By reason of such foreclosure the bankrupt lost the property and was unable to convey to Castle which undoubtedly the Beverlyridge Company would have done had it been in a position to do so.

The claimant Castle could have done no more than he did. He obtained Oswald's signature to the contract. He could not have compelled the rest of the partners to sign it. That duty rested on the partners themselves. Their neglect or refusal to sign the contract with Oswald, would or could not defeat Castle's claim to the property; it was an act to be performed by them alone.

At no stage of the transaction between Castle and the bankrupt was Castle's claim denied, until the trustee in bankruptcy filed his objections to the claim.

2. The Signature of Charles Stone, One of the Partners, Binds All of the Other Partners.

> "Every general partner is liable to third persons for all the obligations of the partnership jointly with his co-partners." Sec. 2442 *Civil Code,* State of California.
>
> "Every general partner is agent for the partnership in the transaction of it's business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his co-partners by an agreement in writing." Sec. 2429, *Civil Code* of the State of California.

Under this section not only the agreement to convey,

but also the contract with Oswald binds the Beverly-ridge Company. Claimant cannot see how the partnership can avoid the obligation of the partnership created by one of the partners. It was unnecessary to have all the partners sign and had they all signed no greater obligation would have fallen upon the partnership than that created by one of the partners for benefits coming to the partnership.

3. Charles Stone Had a Power of Attorney from the Co-partners.

In addition to the rule of law as to the obligations created by one partner, we have also the Power of Attorney executed by all the partners to Charles Stone (Trans. of Record, p. 130). This alone is sufficient even in the absence of a partnership relation to bind the company and each of the partners. The company now should be estopped from denying liability under the agreements made by Charles Stone for and on behalf of the company.

4. It Was Unnecessary to Have the Wives of the Partners Execute Any of the Agreements Herein.

The referee apparently based his decision against this claimant on the additional reason that the real property agreed to be conveyed was community property, and therefore, in the absence of the signature of each of the wives was not binding. (Trans. of Record, pp. 40-42 inc.)

Real property in the State of California can only be held in certain ways which are specifically provided in Sec. 682 of the *Civil Code* of the State of California and are as follows:

> "The ownership of property by several persons is either—
>
> 1. Of joint interest;
> 2. Of partnership interests;
> 3. Of interests in common;
> 4. Of community interest of husband and wife."

In the case at bar, the real property held by the bankrupt herein could have been held only in two ways at the most, either that of a partnership interest, or, in an extreme case, that of a community interest of husband and wife.

Section 684 of the *Civil Code* of this state sets forth:

> "A partnership interest is one owned by several persons in partnership for partnership purposes."

Section 687 of the same *code* states:

> "Community property is property acquired by husband and wife, or either during marriage, when not acquired as the separate property of the other."

In this case the claimant contends that the property was held by the trustee for the benefit of the partnership, and therefore was partnership property. This is borne out by the instrument or agreement between the co-partners (Trans. of Record, pp. 122-127). In which it sets forth that the property was to be conveyed to a trustee for the benefit of the partnership and in it the

interests of the partnership are set forth. Also on page 125 of the Transcript of Record the IV article of the agreement provided that Charles Stone would be the attorney in fact and director of each of the parties of the partnership. Article V at page 126 of the Transcript of Record further provided that the enterprise should be carried on by the parties as partners in the proportions specified in the agreement, and that the name of "Beverlyridge" be adopted as the trade name thereof.

Also the Deed of Trust (Trans. of Record, pp. 127-30), conclusively shows that the property was held in partnership interests. The property in question was deeded by Charles Stone and Clara Stone, *his wife,* trustors, to Charles Stone, trustee, for the Beverlyridge Company, a co-partnership. In the Deed of Trust the powers are specifically set forth. Transcript of Record, page 128, states "To have and to hold said property, subject to encumbrances now of record thereon, upon the following express trusts, to-wit:

1. To hold, sell, and convey same or any part thereof and to hold or reinvest or apply or dispose of the proceeds of such sales in accordance herewith.

2. The Trustee shall have power in his own uncontrolled discretion and without the consent or any act of beneficiary, *to sell, and convey any part or portion or all of the above described premisess* to dedicate streets and roads; *to contract for and cause to be installed pavements, sidewalks curbs, conduits grading or regrading upon the said premises or any part thereof,* and for said purposes or any of them, to charge the said premises or

any part thereof or to mortgage same or any part thereof, or to execute and deliver deed or deeds of trust conveying same or any part thereof.

* * * *

It Being Expressly Understood and Agreed that the title to said real property is vested in said trustee absolutely, and that said trustee has and shall have during the life of this trust full power and authority to sell, mortgage or convey the same or any part thereof, and that the beneficiary has, and shall have, no title legal or equitable in the said real property or any part thereof, but only an equitable title as beneficiary in the net proceeds of the sale of the said real property or any part thereof.

This deed conveying the property to Charles Stone as trustee was also executed by Clara Stone, wife of Charles Stone. Therefore the title was in Charles Stone as trustee for the bankrupt herein free from any community interest which Clara Stone might have had in it. By what theory can it be held that it was necessary for the wives to sign any agreement to convey the property.

Granted that the wives have a community interest in the earnings of their husband in the co-partnership, it is not an interest which would have required their signatures to a conveyance of the real property therein, as it was held by a trustee. Further there are numerous cases dealing with community property which hold that property belonging to a co-partnership is personal property

in the eyes of the law. In *Dupui vs. Leavenworth,* 17 Cal. 263, at page 268, the court said:

> "In equity, real property acquired with partnership funds for partnership purposes is regarded as personal property so far as the payment of partnership debts and the adjustment of partnership rights is concerned, and in view of equity, it is immaterial in whose name the legal title of the property stands, whether in the individual name of one of the copartnership or in the joint name of all. The possessor of the legal title in such case holds his estate in trust for the purposes of the copartnership."

The following are some of the cases discussing this question:

> Moran v. McInerney, 129 Cal. 29, (saying that in a suit for dissolution and accounting, real estate should be treated as personalty); Chapman vs. Hughes, 104 Cal. 302, (holding that when a partnership is formed to deal in lands, and the parties contribute certain tracts, the lands become subject to the partnership agreement, although each party retains title to his tract, the titles being held in trust for firm purposes); Woodward v. McAdam, 101 Cal. 438; Bates vs. Babcock, 95 Cal. 479; Duryea vs. Burt, 28 Cal. 569; Jones vs. Parsons, 25 Cal. 100; Gray vs. Palmer, 9 Cal. 616, (holding that while firm realty for the purpose of disposal and distribution is to be treated as personal estate, there is an exception when there are no firm debts, in which case it should be partitioned if practicable); Tutt v. Davis, 13 Cal. App. 715, (holding that as between the members of partnership formed to deal in real estate, and in the settlement of equities between themseves, the assets of the firm will be regarded as personal property.

In this state, the husband having complete control over the disposition of the personal community property, so long as it is disposed of for value, the wife's consent is unnecessary. Notwithstanding the view that the referee took with reference to the property being held as community property it is plainly seen that the agreements were valid and binding in the absence of the signatures of the wives for the reasons set forth above.

5. The Agreement to Convey Is Binding Upon the Bankrupt.

The referee's theory that it was necessary to have the wives sign the contract to convey was in error for the additional reason that the contract covered an act to be performed, to-wit: the conveyance of the property at a future time, and was not a present conveyance of the title.

It is elementary that a man may make a contract to convey real property at a future date, and should the title to the property be held as community property by such man and his wife, and the wife refuse to join in the execution of the deed, an action for specific performance would not lie. However, an action for damages for the breach or failure to convey the property would lie against the husband signing the contract.

In the case at bar the co-partnership is composed of certain men, as set forth in the partnership agreement, supra, transcript, pp. 122-126, and they were the partners making up the Beverlyridge Company which is now in

bankruptcy. Had their wives signed the agreement to convey, then not only would Richard Castle have a claim against the co-partners and members of the partnership, but would also have a cause of action against the wives who were not in any way connected with the partnership.

It must be remembered that Oswald and Castle are herein seeking to collect only from the assets of the co-partnership which are in bankruptcy, and not from the wives who are not connected with the co-partnership, nor in bankruptcy.

II.

That the Findings of Fact and Conclusions of Law Are Not Supported by the Evidence and the Court Erred in Finding:

(b) (Finding XI) That the Deal Which When Completed, Was to Entitle the Claimant to $25,000 Worth of Property in Beverlyridge, Was Never Completed and that Said Claimant Did Not Perform Any Services for the Beverlyridge Company in Accordance With His Agreement.

The Referee seems to lay great stress upon the fact that Castle never completed his deal and did not perform the services under his agreement, and in giving his reasons, refers to the letter of Nov. 5th, 1925, written by Charles Stone as the Managing Director of the bankrupt. It was addressed to Castle and reads as follows:

> "In connection with your efforts on our behalf in obtaining contract for us with Oswald, we herewith beg to state that when this deal is completed,

> we shall deed to you $25,000 worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500 and $1600."

On November 19, 1925 Castle secured Oswald's signature to the contract referred to in the letter of November 5, 1925, and on December 14, 1925 the bankrupt, by its managing partner, Charles Stone, entered into another contract with Richard Castle, being the agreement to convey real estate (Tr., pp. 8-12). This agreement covers by metes and bounds the description of the real property to be given to Castle in consideration for his having secured Oswald's signature to the contract. It recites that is is given "In consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, etc.", and does not require Castle to do any act, or pay any future sums of money to the Beverlyridge Company before he shall receive the land described therein.

It calls for a definite release price to be paid, but such release price is paid to the holders of the blanket trust deeds covering the property. The contract is of, and in itself, an acknowledgment that Castle has performed everything upon his part to be performed as far as the Beverlyridge Company was concerned, in order to secure the property therein described. Had there been anything left for Castle to do or any other conditions to be performed by Castle, it would unquestionably have been inserted in said agreement to convey, the same as the conditions requiring Castle to give a claim deed so that a map might be recorded, and to thereafter pay the release

price when the map was recorded. Nor is there a scintilla of evidence that at the time Charles Stone executed and delivered said agreement to convey on the 14th day of December, 1925, to the claimant Castle herein, that Stone did not consider Castle had completed his agreement.

The only reason that the agreement to convey was delivered to Castle instead of an absolute conveyance, was the fact that the Beverlyridge Company had not, at that time, had a map or plat covering said property recorded in the County Recorder's office of Los Angeles County, and for the further reason that the portion of the property to be received by Castle was less than one acre and the blanket trust deeds covering the property provided that not less than one acre would be released from the lien of the trust deeds. As a result Castle could not pay the release price and recover the property which was agreed to be conveyed to him because it was less than one acre.

We thus find that the contract of Dec. 14, 1925, definitely established the rights of the respective parties and took the place of, and merged or cancelled whatever conditions were contained in said letter of November 5th. The referee stated, in his opinion, that Castle should have paid the release price referred to in the deeds of trust covering said property and thereby obtained the deeds to the property. The answer to this contention is that the agreement itself provides that "It is further understood and agreed that as soon as the party of the first part shall have caused to be duly approved and recorded

in the office of said recorder, a map or plat of the tract which contains the above described premises, party of the second part (Castle) shall quit claim and reconvey said premises by the same description to party of the first part, and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.

> "It is further understood and agreed *that at the time of such conveyance* the party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the Trustee under two certain deeds of trust, each of which is now a blanket lien on the within described premises and other property."

The evidence shows no map or plat was ever recorded, so under the agreement Castle was not required to pay the release price. The time at which the map or plat was recorded was the time agreed upon for Castle to pay the release price.

Another reason why the release price could not be paid was the fact that the property which Castle was to secure was less than one acre, and was so stipulated (Tr. of Record, p. 122). The very terms of the trust deed under which the bankrupt was buying the property provided that it could obtain releases of only one acre or more by the payment of the release price. It did not give the bankrupt any right to purchase or release from the lien of said trust deeds less than one acre, and Castle had no greater rights than the bankrupt.

After Castle had secured Oswald's signature on the contract there was nothing further for him to do, as it was then in the power of the Beverlyridge Company to go ahead and complete its contract with Oswald. Castle had procured the contract and the fact that the bankrupt partnership failed to carry out the terms of the Oswald contract by its failure to deliver the plans and specifications to Oswald, thereby preventing him from going ahead with the contract, was no fault of Castle's. All that was required of Castle was to obtain the signature of Oswald, who was ready, able and willing to perform the obligations of the contract.

Many authorities support this contention:

Stanton v. Carnahan, 115 Cal. App. 527. The contract involved was as follows:

> "The buyer (Carnahan, the defendant) agrees to pay Stanton & Welch $300 commission. Seller (Crawford) agrees to pay Stanton & Welch $100 commission when deal is completed."

The Court said:

> "Upon this record, however, we must assume that evidence was introduced which tended to establish the fact that the failure to complete the deal was due to want of performance on the part of defendant, and hence the due performance or completion of the deal upon which payment was made contingent was excused." (Citing C. C., Sec. 1512.)

Section 1512 of the *Civil Code* of California reads as follows:

> "If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the bene-

fits which he would have obtained if it had been performed by both parties."

Sections 1439 and 1440 of the *California Civil Code* read as follows:

"1439. Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section."

"1440. If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

III.

That the Findings of Fact and Conclusions of Law Are Not Supported by the Evidence, and the Court Erred in Its Findings.

(c.) "Finding 12). The Court finds that George H. Oswald refused to comply with the terms of the agreement which he had signed, but which was incomplete as to the signatures of others, and that the bankrupt has received nothing of value by reason of the services rendered by Richard Castle."

There is not a scintilla of evidence that Oswald re-

fused to comply with the terms of the agreement which he had signed. Oswald testified he was ready, able and willing at all times to go on and complete the work as set forth in the contract, under the terms and conditions of the contract. He also testified that he did not go ahead with the work because of the fact that the Beverlyridge Company did not produce the plans, specifications and permits as they were required to do under the contract, and that he, Oswald, requested the plans, specifications and permits dozens of times; and it was also stipulated that Oswald had the financial ability to comply with the contract. (Tr. of Record, pp. 113-114.)

The portion of said finding that the bankrupt received nothing of value by reason of the services rendered by Castle is certainly not supported by the evidence, for Castle delivered the contract calling for $500,000.00 or $600,000.00 worth of improvements signed by Oswald, who was at all times ready, able and willing to complete the work if the Beverlyridge Company had complied with the terms of the contract. In addition, the Beverlyridge Company recognized that the obtaining of the contract by Castle from Oswald to make the improvements was something of value when it gave Castle the agreement to convey (Tr., p. 8) $25,000.00 worth of property, and in return was to receive no further consideration from Castle. If the bankrupt had not deemed the obtaining of the Oswald contract of value, it certainly would not have agreed to give Castle over $20,000.00 worth of real property.

It is the contention of the claimant herein that in view

of the power of attorney (Tr., p. 130) and the law in the matter, an instrument signed by Charles Stone, who was a partner, for and on behalf of the partnership, is the act of the partnership; therefore, the contract executed by Stone on the one hand and Oswald, on the other, even in the absence of the signatures of the remaining partners and their wives is not only binding upon the partnership, but also upon Oswald.

> "A contract which purports on its face to be inter partes need not invariably be signed by all parties named in the contract in order to become operative, and in the absence of a showing that the contract was not to be deemed complete until other signatures should be added, the parties signing it will be holden thereon."
>
> (*Cavanaugh vs. Casselman,* 88 Cal. 543.)

The signatures of the remaining partners and their wives could have given no further legal effect to the contract of Oswald than could it have given the agreement to convey to Castle, and the same law, argument and reasoning applies to this agreement between Oswald and the partnership as has been set forth above. Oswald was bound to perform his agreement under his contract when he and Stone executed it. The minds had met and when he and Stone executed the agreement all the parties that were necessary to the agreement had signed and the agreement was enforceable by both parties thereto. We feel in view of the arguments heretofore set out that anything further would be in repetition and therefore useless.

IV.

That the Findings of Fact and Conclusions of Law Are Not Supported by the Evidence and the Court Erred in Finding:

(d) (Finding No. XIII) That Richard Castle Is Entitled to Eight Hundred and Eighty ($880.00) Dollars Which He Loaned Said Bankrupt Estate to Permit It to Pay Certain Bills and Expenses, and for Which He Has Never Been Repaid.

This finding is in error for the reason that the claimant is not only entitled to the $880.00 above found, but is also entitled to the sum of Twenty Thousand, Four Hundred and Seventy-four ($20,474) in addition by reason of said agreement to convey said property to him for services rendered. That the said sum of $20,474.00 was fixed by stipulation as the amount Castle was damaged, if his claim is allowed. (Tr., p. 122.) The reasons, facts and authorities heretofore set forth in answer to the findings and assignments of errors are again referred to in support of appellants' contention to this assignment of error.

V.

That the Court Erred in Concluding that Richard Castle Has No Claim Against the Bankrupt Estate for $25,000 or Any Other Sum, Under the Agreements of November 5, 1925, or December 14, 1925, and Has Not Been Damaged in the Sum of $25,000, or Any Sum Whatsoever, and His Claim for Damages Therefor Is Disallowed.

This conclusion is consistent with the findings as found by the court, but in view of the fact that the findings are against the evidence and law, the court erred in making this conclusion. The reasons, facts and authorities set forth in answer to the findings and assignment of errors are again referred to in support of appellants' contention to this assignment of error.

VI.

That the Order Pursuant to the Findings Is Contrary to Law.

In reference to the above assignment of error, and in conclusion we respectfully submit that the District Court should not have affirmed the findings and order of the referee as to Castle's claim, but should have changed the same, allowing claim of Castle in the sum of $20,474 by reason of the fact that he secured a contract signed by Oswald calling for approximately $500,000.00 worth of improvements. The said Oswald was ready, able and willing to carry out said contract; that after rendering said services and securing the contract signed by said Oswald, said bankrupt co-partnership delivered to Castle a contract setting forth the specific land, the time when the same was to be conveyed, and that Castle has performed everything on his part to be performed, and that the property which he was to receive was lost by the Beverlyridge Company through no fault of Castle's.

VII.

That the Order Pursuant to the Findings Is Contrary to Law.

In reference to the above assignment of error, and in conclusion, we respectfully submit that the District Court erred in affirming the findings and order of the referee as to Castle's claim, and should have changed the same, allowing the claim of Castle in the sum of twenty thousand four hundred seventy-four dollars ($20,474.00) for the following reasons:

(a) Castle in good faith secured the contract signed by Oswald calling for approximately five hundred thousand dollars worth of improvements;

(b) Oswald in good faith signed the contract and was ready, able and willing to comply with the same;

(c) Castle performed his obligation so far as the bankrupt was concerned when he secured the contract signed by Oswald;

(d) The bankrupt acknowledged its indebtedness and that Castle had performed his obligation when it executed the contract or agreement to convey, setting forth the specific land, the time when the same was to be conveyed, and demanded nothing further of Castle;

(e) Castle performed everything on his part to be performed, as provided in the agreement to convey;

(f) That the property which Castle was to receive was lost by the Beverlyridge Company through no fault of Castle's, thereby preventing Beverlyridge Company from performing its contract, and causing Castle a loss of $20,474.

STATEMENT OF THE CASE OF GEORGE H. OSWALD

The claim of George H. Oswald was presented and heard at the same time with the claim of Richard Castle, and because of their close connection the matters were consolidated. The matters were considered together when reviewed by the District Court and therefore the same Transcript of Record is used and only one brief filed. However, since they are separate matters, certain points must be treated separately even though the law as applied to the Castle contract must be also applied in this matter.

Oswald's contract with the Beverlyridge Company called for improvements in the tract amounting to between $500,000 and $600,000. The contract is found in the Transcript of Record beginning at page 18, as follows:

> "This Agreement made and entered into this 19th day of November, A. D., 1925, by and between Charles Stone, Trustee, Charles Stone and Clara F. Stone, his wife, John M. Pratt and Dorothy Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and W. R. Norcross, an unmarried man, parties of the first part, and George H. Oswald, party of the second part: Witnesseth:
>
> (Herein follows work to be done.)
>
> In Witness Whereof, The parties have hereto set their hands and seals the day and year first above written.
> Charles Stone, Trustee
> Charles Stone
> F. A. Arbuckle, by Charles Stone, Atty. in fact
> John M. Pratt, by Charles Stone Atty in fact

W. I. NORCROSS, by Charles Stone Atty in fact
JAMES WESTERVELT

Parties of the First Part

GEO. H. OSWALD,

Party of the Second Part."

As will be noted, the contract was executed by Geo. H. Oswald, party of the second part, and Charles Stone, as trustee, together with himself individually. He also executed the agreement under his power of attorney on behalf of the other partners. He held no power of attorney of the wives of the partners. It will be noted that the wives were not considered partners in any of the agreements.

SPECIFICATIONS OF ERROR AS TO GEORGE H. OSWALD

I.

That the Findings of Fact and Conclusions of Law Are Not Supported by the Evidence and Are Contrary to Law, and the Court Erred in Finding:

(a) (Finding No. VI) That the interest of Charles Stone in the property mentioned in the agreement was a community interest in which his wife shares, as community property.

(b) (Finding No. VIII) That there is no evidence empowering Charles Stone to sign the agreement on behalf of the wives of the various parties, nor did he so sign, nor is there any evidence that he claimed to represent said wives.

(c) (Finding No. XIII) That the contract, marked Exhibit 3, and dated the 19th day of November, 1925, never became effective because of the absence of the signatures of all of its parties, and the claimant, George Oswald, did not consent to the acceptance of the contract without the signature of all of the parties named herein, and did in fact refuse to consider it in force and proceed with the work.

(d) (Finding No. XV.) That George Oswald is entitled to Three Hundred, Two and 43/100 Dollars, which he loaned said bankrupt on the 8th day of December, 1925, to enable the bankrupt to pay its telephone bill.

(e) (Conclusion of Law I.) That George Oswald is entitled to the sum of Three Hundred, Two and 43/100 Dollars from said bankrupt, being money loaned by him to said bankrupt to enable them to pay their telephone bill.

(f) (Conclusion of Law No. II.) That George Oswald is entitled to no damages from said bankrupt.

II.

That the Order Pursuant to the Findings is Contrary to Law.

III.

That the Court Erred in Admitting Testimony Over the Objections of the Claimant.

IV.

That the Court Erred in Disallowing a Portion of the Said Claim.

V.

That the Court Erred in Refusing to Admit Testimony of Claimant.

ARGUMENT.

I.

That the Findings of Fact and Conclusions of Law are not Supported by the Evidence and are Contrary to Law; and the Court Erred in Finding:

(a) (Finding No. VI) That the Interest of Charles Stone in the Property Mentioned in the Agreement was a Community Interest in Which his Wife Shares, as Community Property.

The referee and trustee both contend that there was a community interest held by the wives in the property of the partnership, and the referee based his decision largely upon that ground. In view of the facts and law discussed heretofore in the Castle claim, we feel that those contentions are controverted and that the finding above set out is not supported by evidence and is contrary to law.

As will be seen Charles Stone and Clara Stone, his wife, executed a Deed of Trust to Charles Stone as trustee for the partners named in the Deed of Trust. (Trans. of Record, pp. 127-29.) It will be noted in that instrument that the wives are not mentioned and

we believe that it is not the contention of the trustee that the wives were partners. Stone holding the property as trustee for the partnership, and in view of the powers given him in the Deed of Trust, had full power to sell, convey, and contract for improvements. The copartnership was bound by his signature. The signatures of the wives on the agreement was neither necessary nor would they have given any greater legal effect to the instrument. It is not contended that they were guarantors and therefore their signatures would have been valueless. The partnership could have enforced the contract as against Oswald, if there had been no default upon their part.

It makes no difference whether or not the property to be improved was community property. The husband has control over it and can contract for improvements without his wife's signature. If the property is community property it might in some cases take the wife's signature to convey her interest, but never in a case such as this where it is held in trust by one individual for the partnership. The wife of Stone conveyed her interest to her husband as trustee for the remaining partners, and she therefore is estopped from asserting an interest in it.

We feel that the finding is contrary to the evidence and law and is alone sufficient, in view of the written opinion of the referee to warrant a reversal of the order appealed from.

II.

That the Findings of Fact are not Supported by the Evidence and are Contrary to Law and the Court Erred in Finding:

(b) (Finding No. VIII.) That There is no Evidence Empowering Charles Stone to Sign the Agreement on Behalf of the Wives of the Various Parties, Nor Did He So Sign, Nor is There any Evidence That he Claimed to Represent Said Wives.

It is the contention of the claimant Oswald that it was unnecessary for the wives to sign the contract in order to make it a valid and binding claim against the bankrupt, as the wives were not members of the partnership and had no interest in the property of the partnership itself. Also, Charles Stone, being the managing director of the partnership, with a power of attorney from the remaining partners, and the powers conferred upon him by reason of the conveyance of the property in trust to him, was the only one necessary to execute the agreement. This claimant feels that in view of the law and facts referred to in the brief of Richard Castle relative to this point that it would be merely repetition to again set it forth.

III.

That the Findings of Fact are not Supported by the Evidence and are Contrary to Law and the Court Erred in Finding:

(c) (Finding No. XIII) That the Contract, Marked Claimant's Exhibit 3, and Dated the 19th Day of November, 1925, Never Became Effective Because of the Absence of the Signatures of all of its Parties, and the Claimant George Oswald did not Consent to the Acceptance of the Contract Without the Signature of all of the Parties Named Herein, and Did in Fact Refuse to Consider it in Force and Proceed with the Work.

As stated in the brief of Castle, the contract executed by Oswald was binding when signed by Oswald on the one hand and Charles Stone on the other, so far as the bankrupt co-partnership was concerned. Stone had full power to act for the partnership and his signature is alone binding. Whether Oswald treated it so or not, it was binding upon him and could have been enforced. We again call the court's attention to the case heretofore cited, to-wit:

Cavanaugh vs. Casselman, 88 Cal. 543.

We also find that Oswald was unable to do any work under the contract for the reason that the bankrupt failed after repeated requests, to furnish the permits to do the work. The maps and plats had to be first approved by the City of Los Angeles, and permits issued before the work was done (Tr. Rec., p. 113), and it was incumbent upon the bankrupt to furnish the plans and permits.

In Paragraph 2 of the contract signed by Oswald we find:

"All of the above work to be under the inspec-

tion of the City of Los Angeles, according to the plans and profiles to be furnished by the parties of the first part and approved by the City of Los Angeles, permits for the above work to be taken out by the parties of the first part (bankrupt) and the costs of said permits to be paid by the parties of the first part."

This alone prevented Oswald from doing any work under the contract as the permits were never taken out. It was a condition precedent to be performed by the bankrupt before Oswald could do anything under his contract.

Conclusion

The remaining specifications of error can be grouped together in their consideration, as they are all sustained by reason of the facts and law set forth herein above.

We submit that the District Court should have reversed the findings of fact, conclusions of law and order thereon made and entered by the Referee on the grounds set forth herein as to both Richard Castle and George H. Oswald.

Wherefore these claimants pray that this court enter its judgment answering the order affirming the Referee's findings of fact, conclusions of law and order thereon and grant these appellants relief as prayed.

Respectfully submitted,

GEO DE LANEY BLAIR,

J. GILBERT FALL,

Attorneys for Appellants.

No. 5914

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of Beverlyridge Company, et al., bankrupt; George H. Oswald and Richard Castle,

Appellants,

vs.

John Beyer,

Appellee.

BRIEF OF APPELLEE.

LORRIN ANDREWS,
Attorney for the Trustee in Bankrupty.

Chapman Bldg., Eighth & Bdwy., Los Angeles,

Parker, Stone & Baird Co., Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 5914

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Appellants,

vs.

John Beyer,

Appellee.

BRIEF OF APPELLEE.

As stated in appellants' brief, by stipulation the cases of George H. Oswald and Richard Castle have been consolidated and are to be presented in one brief. These are both claims against a bankrupt which will be known in this brief as the Beverlyridge Company, which was a copartnership consisting of six (6) individuals.

For convenience the appellee will take up the cases separately in this brief.

Statement of Facts in the Case of Richard Castle.

Attorney for the appellee feels that in presenting the facts of this case, he cannot do better than quote the opinion of the Referee in Bankruptcy on the claim of Richard Castle:

"On November 5th, 1925, Charles Stone, as the managing director of the bankrupt wrote the claimant Richard Castle stating:

'In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed, we shall deed to you $25,000 worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500 and $1600.' [Printed Transcript of Record, page 84.]

"On December 14th, 1925, the bankrupt, by Charles Stone as trustee, executed a document, the original of which has been filed herein as Claimant's Exhibit 1. [Printed Transcript of Record 81-82.] This document, after identifying the parties, proceeds as follows:

'Party of the first part, in consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property' etc.

Thereafter a certain tract of land stipulated to contain 31,850 square feet in the Beverlyridge Tract was described. The document ends with the two following provisions:

'It is further understood and agreed that as soon as party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the Tract which contains the above described premises, party of the second part shall quitclaim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.

It is further understood and agreed that at the time of such conveyance party of the second part

shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain Deeds of Trust, each of which is now a blanket lien on the within described premises and other property.'

Claimant Richard Castle testified that the plat that was shown him divided the piece of property described by metes and bounds in the agreement into three lots. At no time did he offer to pay or tender to anyone the release price of either $1500 or $1600 per lot. [Printed Transcript of Record, page 97.] Approximately five months after the execution of the so-called agreement to convey (Claimant's Exhibit 1) a trust deed which was in existence on the property at the time of the execution of the letter of November 5th (Claimant's Exhibit 2) and the agreement of December 14th, was foreclosed, thereby eliminating any claims that this claimant might have in the real property. [Printed Transcript of Record, page 101.] This claimant at all times had knowledge of the financial condition of the bankrupt, and in fact part of his claim includes the sum of $880.00 which he loaned to the bankrupt to pay salaries. He also knew of the existence of the encumbrances on the real property of the bankrupt. [Printed Transcript of Record, page 99.]

The trustee contends first that there was no consideration for the agreement of December 14th, 1925, agreeing to convey the real property to the bankrupt, by reason of the fact that first, the services purported to have been performed by the claimant in securing the execution by George H. Oswald of an agreement with the bankrupt for the making of certain improvements on its real property, were not complete, because of the fact that all the members of the bankrupt copartnership, and their wives, the property being community real property, did not sign the agreement with Oswald. [Printed Transcript of Record, pages 89 to 91, inclusive, and pages 120-121.] Claimant however proved that Oswald executed the agreement, yet it is unquestionably true that in the absence of

its execution by all of the parties thereto he could consider it void as to himself, and in fact did so treat it later. [See printed Transcript—Letters of Blair and Stone—pp. 111-113.] Eliminating from consideration the question of whether or not the form of agreement was satisfactory to all the members of the bankrupt, not having been signed by all of them and some of them not being present as witnesses to testify concerning its contents, it was signed by Oswald and some of the bankrupts. Under a trust agreement executed by the various members of the bankrupt firm, Charles Stone was appointed trustee with authority to make certain contracts upon the bankrupt's behalf. It was urged that the bankrupt or its trustee can not take advantage of the failure of some of its members to sign the agreement after having authorized its trustee to perform certain acts upon its part, still the authorization was not complete because it concerned community real property and the trust agreement was itself not signed by the wives of all the parties.

There are, however, two more important questions, either of which require the disallowance of this claim. It will be noted that the letter of November 5th contains the clause, 'We herewith beg to state that when this deal is completed'. The "deal" to which the parties had reference was the construction of the improvements on the tract of land in order that it might be sold to the public. While it is true that, to a certain extent, the bankrupt recognized the procuring of the execution of the contract by Oswald as in some measure performing the services agreed to be rendered by him, which recognition is proved by the execution of the agreement of December 14th, 1925, yet this latter agreement is not an actual conveyance but only an agreement to convey. No time limit is set forth as to when the property shall be conveyed but at the conclusion of the agreement we find the two clauses above quoted requiring reconveyances after the approval and recordation of the map of the tract and requiring the claimant at such time to pay the release price to free the property from

the lien of the trust deeds with which it was encumbered. It is therefore clear that it was the intention of the parties that the claimant, Richard Castle, should not be entitled to the property involved until the whole "deal" had been completed, which would require the installation of the improvements, the recordation of the map and the property ready for sale to the public. This stage in the proceedings was never reached, and it was the contention of counsel at the hearing that the agreement of December 14th was in effect a conveyance by the bankrupt to the claimant, Richard Castle, and Castle would be guilty of laches, having with knowledge of the insolvent condition of the bankrupt and the existence of the encumbrances on the property, failed to tender to the trustee under the trust deeds the consideration as set forth in the letter of November 5th, 1925, for which he could have secured a release of the property described, thus permitting his interest to be forfeited by a foreclosure of the trust deed. Oswald refused to comply with his agreement and the bankrupt has received nothing of value by reason of the services rendered by Richard Castle, whose claim should be disallowed."

ARGUMENT.

The terms of bankrupt's offer, as shown by claimant's "Exhibit 1" [printed Transcript of Record, pages 81-83, inclusive] and "Exhibit 2" [printed Transcript of Record, page 84], were as follows:

First: That the claimant should secure for the bankrupt a certain contract with the Oswald Brothers;

Second: That the claimant should pay the release price of certain lots in the Beverlyridge section; for which consideration

Third: The bankrupt agreed to convey to the claimant the said lots.

In support of bankrupt's contention that the release price was to be paid by Castle before conveyance of the property to him, we quote from claimant's "Exhibit 2":

> "It is understood that you (Castle) are to pay the release price on the lots which runs between $1500 and $1600."

and from the claimant's "Exhibit 1" (agreement to convey real estate), in the second paragraph after the legal description of the property:

> "It is further understood and agreed that at the time of such conveyance, party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain deeds of trust, each of which is now a blanket lien on the within described premises and other property";

These understandings and agreements clearly show that the paying of the release price by the claimant was one of the terms upon which the bankrupt's offer was made.

Admitting that the claimant did secure for the bankrupt the said contract (which fact is doubtful) the claimant did not pay the release price on the lots he claims to be due him. For this reason he cannot demand that the bankrupt execute its promise the consideration for which was both the contract and the payment of the price.

Partial performance of the terms of an offer does not bind the promisor.

The offeror is bound by his offer only where the offeree fulfills each and all of the terms of the offer. Part performance is not enough.

6 Cal. Jur., page 424:

"PARTIAL PERFORMANCE: Generally speaking, partial performance of an entire or indivisible contract by one of the parties does not warrant a recovery against the other. Until performance is completed there is in such case no obligation to pay. Full and substantial performance is a condition precedent to the right to maintain an action."

Krumb v. Campbell, 102 Cal. 370;

Carlson v. Sheehan, 157 Cal. 692;

Kurales v. L. A. C. Co., 36 Cal. App. 171.

The claimant in seeking to avail himself of the bankrupt's offer, was bound to use reasonable diligence in taking advantage thereof, and in complying with the terms of the offer.

This he failed to do, for knowing that the property promised was subject to a trust deed, he did not, within the four months, pay the release price. It being common knowledge that trust deeds are foreclosable, and it being within the claimant's knowledge that the property was subject to such deeds, and that the Beverlyridge Company was not in any substantial financial condition, the delay on the part of the claimant is such as would estop him from claiming an unconditional acceptance of the bankrupt's offer.

The trustee submits that the contract is complete on its face, and that such contract conveyed to Castle by metes and bounds all the equity of title which the bankrupt company had in the property so conveyed, and therefore Castle, and not the Beverlyridge Company, was responsible for any mortgage or encumbrance thereon.

"The acceptance of a conveyance, containing a statement that the grantee is to pay off an incumb-

rance, binds him as effectually as though the deed had been inter partes, and had been executed by both grantor and grantee."

Note citing cases under O'Connor v. O'Connor, 7 L. R. A. p. 34.

"Notwithstanding the trust, the trustor may devise or transfer the property subject to the trust. (Civil Code, Sec. 864.) And the devisee, or grantee acquires a legal estate against all persons except the trustees and persons lawfully claiming under them. (Civil Code, Sec. 865.)"

Sacramento Bank v. Alcorn, 121 Cal. 379 at p. 383.

"When the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor."

Wood v. Goodfellow, 43 Cal. 185 at p. 189.

"It has been repeatedly determined that where a person buys land absolutely for a stipulated price, and, instead of paying the whole of it to the grantor, is allowed to retain a part, which he agrees to pay to a creditor of the grantor having a lien upon the land, the amount which he thus agreed to pay is his own debt, and although the arrangement does not discharge the grantor from liability to the lien creditor, who is no party to it, yet, as between the grantor and the grantee who has thus assumed the debt, the grantor is a mere surety."

Snyder v. Summers, 27 American Reports, p. 783.

LACHES.

The claimant knew that there were trust deeds upon the property which included the lots he had purchased from the Beverlyridge Company. He was bound to know that these trust deeds might be foreclosed, and that if

they were foreclosed before he had paid the release price of the property his lots would be foreclosed under the blanket trust deed. He had from the 14th day of December, 1925, until the 24th day of April, 1926, to release his lots by tender of the purchase price. He failed to do so, and his failure was the direct cause of his loss of the property. The Beverlyridge Company had paid him in full for his services when they executed the contract transferring their equity in the lots in question to Castle. They would not give him a deed, because the only person who could give him a deed was the trustee in whose name the lots were held.

The Beverlyridge Company was not bound to keep the trust deed alive beyond a reasonable period, because Castle could pay the release price at any time and thus release his lots.

That Castle could be deliberately guilty of laches and then hold the Beverlyridge Company for a sum equal to his commission is against all principles of equity.

Laches is defined as:

> "Such neglect or omission to assert a right as, taken in conjunction with the lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."
>
> 10 Cal. Jur. 520.

> "In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question *whether the rights of the defendant, or of other persons, have been prejudiced by such delay.* (Citing cases.)
>
> * * * * * * * * *

The defense of laches is different from the defense of the statute of limitations in this, that in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed."

Cahill v. Superior Court, 145 Cal. 42, at pp. 46-47.

"Equity will not relieve against culpable negligence or inexcusable laches. Ignorance of the alleged fraud will not excuse appellant's laches, especially as her ignorance may be traced directly to her."

Tynan v. Kerns, 119 Cal. 447 at p. 451.

"It is a familiar doctrine of laches, apart from any question of statutory limitation, that courts of equity will discourage laches and delay in the enforcement of rights, and the general rule is that nothing can call forth the court of chancery into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. (10 R. C. L. 395.)"

Gravelly Ford Co. v. Pope-Talbot Co., 36 Cal. App. 717 at p. 737.

"Laches is a question of fact, on the evidence, *and* each case becomes largely a law unto itself."

10 Cal. Jur. 527.

See also Wolff & Co. v. Canadian Pac. Ry. Co., 123 Cal. 535, at p. 540.

"Notice: Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Civil Code, Sec. 19;

22 Fed. 765, 768.

"A person is in equity guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something whereby he might be injured should he be allowed to enforce his rights."

10 Cal. Jur. 531.

"It is also a well recognized principle that 'A person is, in equity, guilty of laches such as to preclude him from obtaining relief, only when he has, by his own conduct or negligence and delay, induced or suffered another to do something or abstain from doing something, whereby the latter might be injured, if the person guilty of such delay should be allowed to enforce his rights notwithstanding the negligence and delay. The doctrine was never intended to protect the fraudulent, but to shield the innocent.'

In determining what will constitute such unreasonable delay regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or any other person, have been prejudiced by such delay."

Taber v. Bailey, 22 Cal. App. 617 at page 623;

See also American Emigrant Co. v. Call, 22 Fed. 765 at p. 768.

Statement in Regard to the Claim of George Oswald.

Attorney for the trustee cannot do better, as a statement of facts, than to copy from the referee's opinion on the claim of George Oswald as given in the printed Transcript of record, pages 55-58 inclusive, as follows:

"This agreement is evidenced herein as claimant's Exhibit 3, and provides for the doing of certain improvement work upon the tract of land owned by the bankrupt at a cost of approximately $500,000.00. The parties of the first part in the agreement are Charles Stone, trustee, Charles Stone and Clara F.

Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and I. W. Norcross, an unmarried man, the claimant George H. Oswald being the party of the second part. The agreement was signed by Charles Stone, trustee, Charles Stone, F. A. Arbuckle by Charles Stone, attorney in fact, John M. Pratt by Charles Stone, attorney in fact, I. W. Norcross by Charles Stone, attorney in fact and James Westervelt as parties of the first part and George H. Oswald. It appeared from the evidence that all of the parties of the first part except Norcross were married at the time of the execution of the agreement and by the testimony of Stone that his interest in the property was community property. [See printed Transcript of Record, pp. 120-121, and Exhibit 3, pp. 84-85.] Arbuckle, Pratt and Norcross by a certain power of attorney filed with the trust executed in the matter, authorized Charles Stone to execute agreements of this character upon their behalf. No evidence was introduced empowering Charles Stone to sign the agreement upon behalf of the wives of the various parties, and in fact, he does not even purport to so sign. There are two questions involved, first, whether or not the wives of the parties of the first part are necessary parties to the agreement, without whose signatures the party of the second part could not be bound, and second, whether the claimant, George H. Oswald, refused to consider the agreement in effect without the signatures of these parties. Without regard to the wives of the other parties, it is clear that Clara F. Stone was the wife of Charles Stone at the time of the execution of the agreement and at the time the real property was acquired and that the property was community property, and that she had not executed the agreement. Under section 172 A of the Civil Code of this state an agreement for the transferring or encumbering of any interest in real community property is void unless signed by both spouses. Paragraph 13 of the agreement purports to transfer and assign to the claimant all the right, title and interest

of the bankrupt as security for the performance of the terms of the agreement upon their part.

Furthermore, the agreement appears to be one provided to be executed by certain parties. The elimination of one or more parties from the agreement without the consent of the other party would constitute a material alteration rendering it void. It is clear from the evidence that the claimant, George H. Oswald, did not consent to the alteration of the agreement or waive the signatures of the wives of the various parties. On December 31st, 1925, Mr. Oswald's attorney wrote Mr. Stone as follows:

> "Mr. George Oswald has requested that I communicate with you in regard to the following matters:
>
> If you have secured the signatures of the parties of the first part to your contract with George H. Oswald, will you kindly forward the same to me.
>
> Will you also kindly forward the plans and profiles, and obtain the permits necessary to do the work and forward copies of the same to me, so that I can immediately take the matter up with Mr. Oswald." [Printed Transcript of Record, p. 111.]

On January 5th, 1926, Charles Stone wrote Mr. Blair, the claimant's attorney, as follows:

> "Your letter of Dec. 31st with reference to the Oswald improvement contract, received.
>
> We have obtained the signatures of all of the parties to the contract with the exception of one, which will necessitate a trip to Santa Monica on the part of the writer and this will be done at the first possible moment.
>
> The contract which we are to deliver to you will supplant the original contract which was signed by the writer under a trust agreement and power of attorney for all the partners of the Beverly-Ridge Company" * * * [Printed Transcript of Record, pp. 111-112.]

While the above communication refers to the signatures of the parties having been obtained to a contract, yet no evidence was introduced showing its execution and delivery. Furthermore, had this new contract been delivered, it is apparent from the letter of January 5th that it was a different agreement than that of November 19, 1925. On January 23rd Mr. Blair wrote the bankrupt as follows:

> "On December 21st I wrote you and inquired if you had secured the signature of the parties of the first part to your contract with George H. Oswald. A few days later, I saw you at Mr. Castle's and you stated that you expected to have all the signatures within a day or two. As yet, I have not received the contract.
>
> Mr. Oswald has informed me that the plans and profiles and necessary permits to do the work have not been forwarded to him.
>
> I would like to call your attention to the fact that Mr. Oswald is contemplating the undertaking of other large contracts in the near future, and as a result would like to know if the above matters have been taken care of, and if not when they will be. Mr. Oswald feels that if this matter is not taken care of within the next few days, he will have to refuse to accept the contract." [Printed Transcript of Record, pp. 112-113.]

It clearly appears that the claimant Oswald did not consent to the acceptance of the contract without the signature of all the parties named therein, and did in fact refuse to consider it in force and proceed with the work. While it is undoubtedly true that he had an additional reason, that the plans and profiles had not been filed with the proper authorities nor the necessary permits issued to enable him to proceed with the work according to law, yet the contract never became effective because of the absence of the signatures of all of its parties. No work was done by Mr. Oswald under the contract, and the bankrupt received nothing of value from him. His claim is for profits he alleges would have accrued to him had he completed the contract."

ARGUMENT.

I.

In reply to George Oswald's claim for damages to the extent of $152,000 alleged to have been suffered by reason of breach of contract, the trustee submits that the property on which negotiations were pending was community property and that any contract in relation thereto, to be valid, had to be signed by the wives of the signatories as well as by signatories themselves, and that without the said signatures of the said wives, no agreement concerning the Beverlyridge Tract was binding as a contract. Furthermore, the claimant knew and acknowledged this fact by his demand that such signatures be obtained before he commenced to fulfill his part of the agreement. The said wives never having signed the said agreement, it was not, therefore, a valid contract.

II.

If, however, the court finds that Oswald did have a valid contract with the Beverlyridge Company, contrary to the above contention, then the trustee submits that Oswald, by letters, through his attorney, of December 21, 1926, and January, 1927, being Trustee's Exhibit A, [Printed Transcript of Record, pp. 111-112-113], said that he did not and would not consider the contract binding and would not act thereunder unless the parties' wives joined with their husbands and signed the contract. Trustee hereby submits that these letters were a repudiation of the contract and that the Beverlyridge Company could either have sued for specific performance, or assent to the repudiation by Oswald and thus rescind the contract.

The Trustee further submits that by the conduct of the members of the Beverlyridge Company in not getting their wives to sign, they assented to the repudiation and thus the contract was rescinded and, in support of the proposition that a rescission by the consent of the parties may be implied from their conduct, and that their conduct in this case was sufficient to effect a rescission, we cite the following authorities:

> "A rescission by consent may be implied from the acts of the parties. The giving of notice and the conduct of the parties thereafter may amount to rescission by their mutual consent. Moreover, where a rescission on the part of one party is implied by his refusal to comply with the contract, and the other party acquiesces therein, a rescission by consent is effected, as provided by the Civil Code."
>
> 6 Cal. Jur. Sec. 230 at page 383.

> "The contract was to build a house. The plaintiffs abandoned the contract, and made no efforts to continue the erection of the house. The defendants some time after the abandonment by the plaintiffs, sold the lot and the remains of the building, and thus put it out of their power to require the performance of the contract on the part of the plaintiff. It seems to me, that if an execution of the agreement to rescind cannot be presumed from these circumstances, it would be hard to put a case in which it could."
>
> Green v. Wells & Co., 2 Cal. 584 at p. 585.

In Carter v. Fox, 11 Cal. App. 67, the defendant refused to sell land to the plaintiff in accordance with a written contract. The plaintiff brought suit to recover money already paid for the land which the defendant refused to convey. The defendant then claimed there was a contract and that the plaintiff was guilty of a breach. But the

court held that the contract had by the acts of the parties been rescinded. Said the court:

> "Moreover, we are of the opinion that the facts alleged in the complaint and admitted or found by the court to be true constituted a rescission under subdivision 5 of section 1689 of the Civil Code. When defendant refused to perform the covenants of the contract on his part, and plaintiff, instead of asserting his rights thereunder, acquiesced in and assented to such repudiation and demanded the return of the money paid, such facts were sufficient to constitute a rescission of the contract by consent of the parties."

Carter v. Fox, 11 Cal. App. at pp. 72-73.

> "When defendants, without performance of their promise, in the absence of which no duty was imposed upon the plaintiff to pay the note, demanded the return of the truck and plaintiff complied therewith, a rescission by consent was implied from such acts."

Hogan v. Anthony, 40 Cal. App. 679 at p. 684.

> "There can be no question that a contract can be mutually abandoned by the parties at any stage of their performance and each of the parties released from any further obligation on account thereof; that it may be done by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties."

Thompkins v. Davidow, 27 Cal. App. 327 at p. 335.

> "In Billou v. Billings, 136 Mass. 307 the plaintiff had partly performed, by paying some money to the defendant, when the defendant repudiated the contract. The plaintiff assented to the repudiation, and demanded the return of money paid. The defendant then contended that as the time had not come for him to act, his words did not constitute sufficient grounds for a rescission by the plaintiff. The court said, (p. 308) 'Such a repudiation did more than

excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end. It had this effect, even for want of a tender, the time for performance of the defendant's part had not come, and therefore it did not amount to a breach of contract."

13 Cal. Jur. 615, section 667, note 85.

"While the refusal justifying rescission must be absolute and unconditional, it may be couched in hypothetical terms. Citing 13 Man. 590, where it was held that the refusal of a person buying a quantity of goods to take any more goods 'unless you make the first car right' was sufficient to show an intention not to be bound by the contract."

It is respectfully submitted by the Trustee in Bankruptcy that under the facts of these claims, as set forth in the printed Transcript of Record and under the law set forth herein, that the findings of the Referee affirmed by the District Court of the United States, in and for the Southern District of California, Southern Division, should be affirmed.

Respectfully submitted,

LORRIN ANDREWS,

Attorney for the Trustee in Bankrupty.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. JORDAN,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 5916

Appellant's Brief

F. C. STRUCKMEYER,
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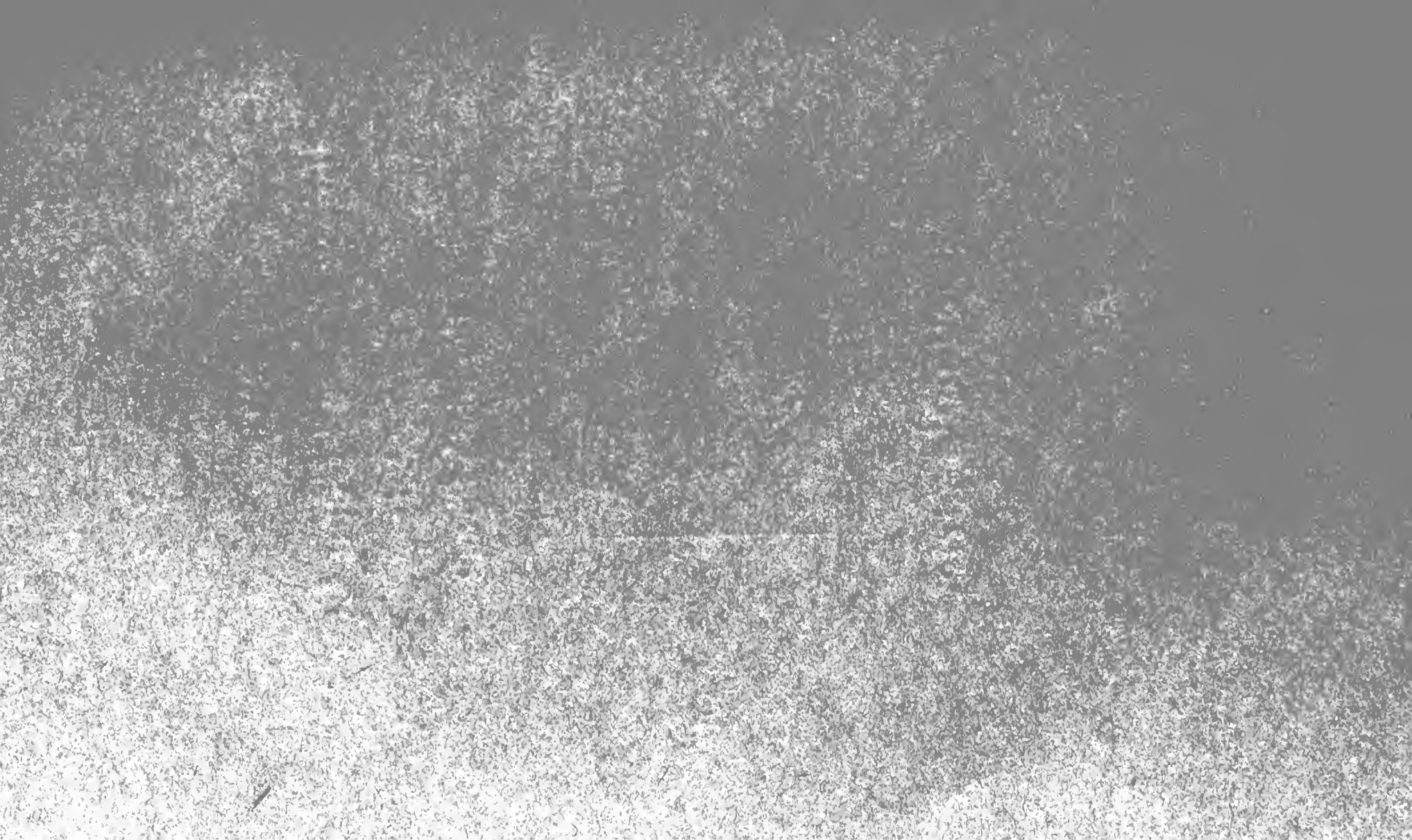

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STATUTES INVOLVED

CASES CITED

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. JORDAN, *Appellant.* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 5916

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action on a policy of War risk insurance.

The appellant, James W. Jordan, enlisted in the military service of the United States on the 5th day of February 1918. No defects or disabilities of plaintiff were noted by any officer of the United States at the date of, or prior to, his application, acceptance and enrollment in the Service or prior to his application for war risk insurance. (Tr. 11-12)*

*(As this appeal is being prosecuted in forma pauperis, the transcript of record has not been printed. There may be some slight error in page references.)

Appellant, on March 11, 1918, and on June 1, 1918, made application for policies of war risk insurance in the sum of $5,000.00 each, and certificates of insurance were issued to the appellant effective the date of the respective applications. Premiums were paid by appellant on said policies from the date of their issuance up to and including the premium due September 1, 1918. (Tr. 12)

Appellant was honorably discharged from the Service September 4, 1918, because of disability resulting from epilepsy. (Tr. 12)

The case was tried with a jury and a special verdict returned as follows:

SPECIAL INTERROGATORY: Was the plaintiff, James W. Jordan, permanently and totally disabled from epilepsy between the date of his entry into the service of the United States, February 5, 1918, and the date of his first insurance contract for $5,000.00. To which the jury answered "YES" (Tr. 15-16)

The appellant moved for judgment upon the special verdict (Tr. 17-18). This motion was by the Court denied and judgment was rendered for appellee (Tr. 18).

The appellant requested the court to charge the jury, in effect, that the policies issued had been in force for a period of more than six months and that because of the incontestable provision, Section 307 of the World War Veterans' Act of 1924, 43 Stat. 627, the validity of the policies could not now be questioned by

the appellee. (Tr. 12-13) These requested instructions were refused by the court.

The principal issue in this case is the construction of the incontestable provision contained in Section 307 of the World War Veterans' Act of 1924 and its applicability to the facts set forth above.

SPECIFICATIONS OF ERROR

I.

That the Court erred in instructing and charging the Jury upon request of the appellee as follows:

INSTRUCTION NO. 1.

> The plaintiff in his complaint alleges that he is permanently and totally disabled because of epilepsy and has been so disabled since July 1, 1918. If you find that the plaintiff suffered from epilepsy between the dates of his entry into the service of the United States (February 5, 1918) and prior to the issuance to him of insurance by the Government March 11, 1918, your verdict must be for the Government as to said contract of Five Thousand Dollars for if the plaintiff was suffering from the same affliction prior as after the issuance of said insurance contract, he suffered no loss subsequent to the date of said contract.

II.

That the Court erred in instructing and charging the jury upon request of the appellee as follows:

INSTRUCTION NO. 2.

The plaintiff in his complaint alleges that he is permanently and totally disabled because of epilepsy and has been so disabled since July 1, 1918. If you find that the plaintiff suffered from epilepsy between the dates of his entry into the service of the United States (February 5, 1918) and prior to the date of the issuance of insurance to him by the Government June 1, 1918, your verdict must be for the Government as to said contract of Five Thousand Dollars for if the plaintiff was suffering from the same affliction prior as after the issuance of said insurance contract, he suffered no loss subsequent to the date of said contract.

III.

That the court erred in refusing to charge the jury as requested by the appellant as follows:

INSTRUCTION NO. 1

As you understand, gentlemen, this is an action upon a policy of War Risk Insurance in the amount of $10,000 issued by the United States Government to the plaintiff while in the military service of the United States. The policy provides that in the event the insured becomes totally and permanently disabled the United States will pay to him the sum of $57.50 per month commencing at the date of such disability. Until the insured becomes totally and permanently disabled it is neces-

sary to keep the policy in force, to pay the premiums thereon. In the event the insured does become totally and permanently disabled while the policy is in force, then such disability matures the policy and no further premiums are required. If said policy has been issued and in force for a period of six months the validity of said policy may not be contested except for the non-payment of premiums or for some other reason with which you are not here concerned. No action has been taken by the Government to contest the validity of the policy in this case and if you find that the plaintiff was on or about the 14th day of September, 1918, or at any time prior to November 1, 1918, totally and permanently disabled, then such policy has been in force ever since the date of its issuance. The sole issue in this case therefore is, did the plaintiff become totally and permanently disabled on or about the 14th day of September, 1918? If you find by a preponderance of the evidence that he did become so disabled, then your verdict must be for the plaintiff. If on the other hand, you are not convinced by a preponderance of the evidence that he became so disabled, then your verdict must be for the defendant.

IV.

The court erred in refusing to charge the jury as requested by the appellant as follows:

INSTRUCTION NO. 2

You are instructed that where two persons enter into a contract or agreement assuming a

certain fact or condition to exist, in the absence of fraud or mistake, neither party to such contract may thereafter deny the existence of such fact or condition. For instance, in this case, the plaintiff and the United States of America entered into a contract whereby the plaintiff became insured against total and permanent disability. The parties assumed and agreed at the time of the issuance of the policy or policies that the plaintiff was not totally and permanently disabled. In the absence of any fraud or mistake, the United States of America is now estopped from asserting that the plaintiff was then totally and permanently disabled. In order to raise these questions, that is of fraud or mistake, it is necessary that some allegation thereof be made in proper form so that an issue of fact may be joined thereon. This the Government has not done. I therefore instruct you that the policy or policies of insurance applied for by the plaintiff and issued to him by the Government were valid and binding contracts of insurance.

V.

That the Court erred in denying appellant's motion for a judgment upon the special verdict and ordering judgment for the appellee.

ARGUMENT

It was the contention of appellee during the trial, and will no doubt be urged before this court, that appel-

lant was totally and permanently disabled at the time the policies were issued and hence has suffered no loss thereunder. The issue thus raised is the physical condition or the insurable condition of appellant at the time the policies were issued.

The position of appellant is as follows:

The physical condition of the appellant at the time the insurance was granted cannot be made the basis of a defense to the action

(a) Under Section 200 of the World War Veterans' Act of 1924 as amended July 2, 1926 43 Stat. 616, appellant at the time of his enlistment in the service was conclusively held to have been in sound condition. Under the act of September 2, 1914, appellant was entitled to have issued to him without further physical examination insurance in the amount of $10,000.00.

(b) The policies were in force for more than a period of six months and are incontestable upon any ground relied upon by appellee.

(c) Appellee is estopped from asserting that appellant was totally and permanently disabled at the time the policies were issued for the reason that it was then assumed and agreed that appellant was not totally and permanently disabled, the parties each having recognized the validity of the contract and appellee accepting the payment of premiums thereon.

In order to present these matters clearly, we will set forth the applicable provisions of the statutes involved:

Section 200 of the World War Veterans' Act of 1924 as amended July 2, 1926, is in part as follows:

> "That for the purposes of this act, every such officer, enlisted man * * who was employed in active service * * on or before November 11, 1918 * * shall be conclusively held and taken to have been in sound physical condition when examined, accepted and enrolled for service, except as to defects, disorders or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception in active service, to the extent to which any such defect, disorder or infirmity was made of record."

The Act of September 2, 1914, c. 293, par. 401, as added by Acts Oct. 6, 1917 c. 105, 40 Stat. 409, is in part as follows:

> "In order to give every commissioned officer and enlisted man * * when employed in active service * * protection for themselves and their dependents, the United States, upon application to the Bureau, and without medical examination, shall grant insurance against the death or total permanent disability of any such person * *"

Section 307 of the World War Veterans' Act of 1924, 43 Stat. 627:

> "Policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, except for fraud or non payment of premiums and subject to the provisions

of Section 23; provided that a letter mailed by the bureau to the insured at his last known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section. Provided further, that this section shall be deemed to be in effect as of April 6, 1917."

Section 23 merely provides that the discharge or dismissal from the service because of treason or any offense involving moral turpitude, etc., shall bar all rights to compensation, insurance, etc.

(a) APPELLANT'S PHYSICAL CONDITION AT TIME INSURANCE GRANTED IMMATERIAL. Appellant was examined, accepted and enrolled in the service of the United States on the 5th day of February, 1918. No defects, disorders or disabilities were noted and made of record by any officer of the United States at that time or prior thereto. Appellant was then conclusively held to have been in sound physical and mental condition and under the provisions of the statute he was then entitled to have issued to him the insurance in question—without medical examination. His physical condition at the time of the application for insurance must necessarily be immaterial, otherwise a medical examination could be required. The officer to whom the application was made could not, under the statute, question his insurability or do aught but issue the insurance. The physical condition of appellant being at that time immaterial, how can such issue become material on an action on the policy? Yet the court submitted that issue to the jury and allowed the jury to find a fact immaterial when the

contract was made, and then made such immaterial fact the basis of judgment.

(b) POLICIES INCONTESTABLE AFTER SIX MONTHS. It seems to be the universal rule that a policy of insurance containing a provision that it shall be incontestable after a specified length of time, with certain exceptions, cannot be contested upon any ground not excepted.

> "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision. Williams v. Insurance Co., 189 Mo. 70, 87 S. W. 499; Massachusetts Benefit Life Assn. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Insurance Co. v. Montgomery, 116 Ga. 799 43 S. E. 79; Wright v. Insurance Co., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; Patterson v. Insurance Co. 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; Mutual Reserve Assn. v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064; Murray v. Insurance Co. 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; Clement v. Insurance Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; Insurance Co. v. McClure 138 Ky. 138, 127 S. W. 749, 27 L. R. A. (N. S.) 1026; 25 Cyc. 873." Harris v. Security Life Ins. Co., 154 S. W. 68.

The assertion that there was no loss under the policy, to which defense the incontestability clause does not apply, is a sham and fictitious contention. Stripped

of its sophistry, it is in truth and fact only a denial of the plaintiff's insurable condition at the time of his application; it is but an assertion that the policy was never in force because of the physical condition of the plaintiff. This the defendant is precluded and estopped from asserting.

In the case of Mutual Reserve Fund Assn. v. Austin, 73 C. C. A. 498, 142 Fed. 398, it was contended that the insurable condition of plaintiff at the time of the application was not covered by the incontestable clause, that the good health of insured was a condition precedent to the validity of the policy, that a condition precedent should be distinguished from a breach of warranty. The court said:

> "They must both stand upon the same ground. We must adopt a construction based upon a consistent application of the same rule."

In the opinion the court characterizes the contention that the incontestable clause does not apply to a condition precedent as fictitious.

> "An agreement that a policy shall be incontestable is of no significance unless we assume the existence of grounds for a contest in the terms of the contract, or in extrinsic facts. * * A construction which renders the clause self-destructive and of no avail to the assured is to be avoided. * * To adopt a construction which includes in the agreement to relinquish defenses all the warranties and conditions of the first undertaking is to destroy the second agreement to relinquish defenses. To avoid

the reductio ad absurdum which follows, if we interpret the words 'in force' to mean a full obligation, counsel contend that the incontestable clause is not a mere pretense, but that it has real significance."

In the case of American National Insurance Company v. Briggs, 156 S. W. 909, the court said:

"Counsel for appellant, however, further contends that the provision that the policy shall be incontestable for any cause whatever, if it continue in force one year from its date, does not include exemption for liability under the provision in the application that the policy shall not take effect 'until the first premium has been paid during my insurability,' the claim being that the incontestable clause does not mean that appellant shall be liable in case appellee possessed no 'insurability' at the time the policy was issued. If, as contended by counsel, the meaning to be attached to said clause is that Mrs. Briggs should have been in the condition of health her application in fact represented her to be, otherwise there would be no liability, we are nevertheless of the opinion that it also must fall before the incontestable clause, after the expiration of the year."

And in Commercial Life Ins. Co. v. McGinnis, 97 N. E. 1018, it was held:

"The incontestable clause amounted to something more than a mere matter of form. As said in the case of Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70

Am. St. Rep. 650: 'The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy. It has been held that an agreement limiting the time within which an action may be brought upon a policy of insurance by the beneficiary is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. If this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts.' By the clause in question appellant took one year for the purpose of investigating and determining whether it would exercise its right to repudiate and rescind its contract on the ground it is now interposing as a defense. If it had exercised any diligence, and the insured's physical condition was that now claimed by appellant, it might easily have discovered such condition within the time reserved by it for that purpose. If it failed to exercise vigilance in this respect, it must be treated as having waived its right to deny liability on such ground. Kline v. National Benefit Assn. 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; Court of Honor v. Hutchens, 43 Ind. App. 321, 82 N. E. 89; Reagan v. Union Mutual Life Ins. Co. 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362; Clement v. New York Life Ins. Co., supra."

The case of Mohr v. Prudential Insurance Company of America, 78 Atl. 554, held as to the necessity of being in good health at the time of delivery of the policy:

> "The defendant does not dispute that a period of more than one year had elapsed between the date of the policies and the death of the insured. The defendant contends, however, that the policies must have had a legal inception in order to sustain an action thereon, and that before the plaintiff could claim the benefit of the incontestable clause she must show that all the conditions precedent to the issuance of the policies have been complied with. To this contention it should be said that the policies were issued and were delivered; that the premiums due upon said policies were received by the defendant up to the time of the death of the insured; that the policies were treated by the insured and the defendant as subsisting contracts between them. The policies upon their face purport an obligation on the part of the defendant. To an action to enforce this apparent obligation the defendant interposes the defense that the insured was not in good health at the time of the delivery of the policies. Upon this ground the *defendant is contesting its liability under the policy*. Such a contest is within the scope of that clause which makes the policy incontestable after one year from its date if all due premiums shall have been paid, without by its terms excluding any ground of defense. To hold otherwise would be to permit such a clause in its unqualified form to

remain in a policy as a deceptive inducement to the insured."

The case of Wamboldt v. Reserve Loan Life Insurance Company, 131 S. E. 395, is squarely in point. The following allegation of the answer in this case was borne out by the evidence.

> "That on said date (date of issuance) plaintiff was blind, having theretofore, to-wit, on June 9, 1921, suffered the entire and irrecoverable loss of the sight of both eyes; that he was permanently disabled at the time the contract was made and that by reason of this fact the said supplemental contract was and is null and void * * *."

It was then contended:

> "Since blindness antedated the making of the disability contract there could have been no valid contract as against that hazard under the rule that continued existence of the subject matter is necessary to sustain the contract."

The court there passed upon the identical question here involved and held that such a defense was precluded, not being excepted by the incontestable clause.

The only exceptions contained in the incontestable clause applicable to this policy are fraud or non payment of premiums. Neither of these defenses can be successfully urged.

PREMIUMS PAID. The first policy in the amount of $5,000.00 was issued March 11, 1918, and premiums were paid up to and including the month of

September, 1918 (Tr. 12). This policy would not have lapsed until midnight, October 31, 1918.

McPhee v. U. S., 31 Fed. (2d) 243. Before that date the policy matured by reason of appellant's total and permanent disability. The second policy of $5,000 was issued June 1, 1918 and premiums paid to keep it in force until October 31, 1918, before which date this policy was matured for the same reason. Therefore, there can be no question raised as to the non payment of premiums.

FRAUD IS NOT CHARGED. No plea of fraud was made by appellee, nor was it asserted during the trial.

> "Fraud is never presumed, but must be affirmatively proved." Northwestern National Insurance Company of Milwaukee v. Chambers, 24 Ariz. 86.
>
> "Fraud must be specially pleaded in an answer as well as a complaint." Tucker v. Parks, 7 Colo. 70, 298, 1 Pac. 427, 3 Pac. 486.
>
> DeVotie v. McGerr, 15 Colo. 467, 24 Pac. 923, 22 Am. St. Rep. 426.
>
> Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497.
>
> Albuquerque National Bank v. Stewart, 3 Ariz. 293.

The defense urged is that the appellant was not in an insurable condition at the time the policies were issued. This is covered by the incontestable clause. The court erred in refusing to give the instructions requested by the appellant and in submitting to the jury

the question of the appellant's physical condition at the time of the issuance of the policies.

(c) APPELLEE IS ESTOPPED TO ASSERT INVALIDITY OF POLICY. If it be contended that the condition of appellant's health at the time the policies were issued is material, then the Government is estopped to now assert that the appellant was then totally and permanently disabled, and that by reason thereof the contract is invalid. It was assumed by the appellent and by the officers of the Government that he was insurable. Both parties treated the contract as in force. Premiums were paid thereon by the appellant and accepted by the United States. In the case of Stevens v. U. S. (8th Circuit) 29 Fed. (2d) 904, upon a similar state of facts, the court adopted this rule:

> "If in making a contract the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident or mistake."

In this case the court held the insured estopped to assert a prior total permanent disability when it was assumed and agreed at the time of making the contract, both by himself and the officers of the United States, that he was not totally and permanently disabled.

It would have been a very simple matter for the United States, under the provisions of Section 307 supra, to contest the validity of the policy in this case had they deemed the contract invalid. Under the statute, a letter addressed to insured at his last known

address is sufficient. Appellant was discharged from the service as being unfit for such duty because of epilepsy. There is nothing in the record to show that the Government at any time asserted that there was fraud, mistake or any other fact that would invalidate this policy. Where the statute requires such assertion to be made within six months, it certainly cannot be made after ten years.

THE COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR JUDGMENT. The jury by the special verdict found that appellant was totally and permanently disabled at a date prior to the time when his policies would otherwise have lapsed. It necessarily follows that he has been totally and permanently disabled at all times since and, if the policy is incontestable, entitled to recover. Upon the special verdict, the appellant moved for judgment. This was denied by the court. It is conceded that appellant was regularly enlisted in the service and that insurance against total and permanent disability in the amount of $10,000 was issued to him. By the finding of the jury, his total and permanent disability matured the policy. Every fact essential to support a judgment in his behalf was thus conceded or found by the jury. The special verdict found is controlling over the general verdict returned.

McPhee v. U. S., 31 Fed. (2d) 243.

It would serve no useful purpose to retry the case, as there is no dispute in the essential facts. A judgment for the appellant should be ordered upon the special verdict.

CONCLUSION

In conclusion we respectfully submit:

1. That the court erred in submitting to the jury the issue of appellant's physical condition at the time the insurance was granted for the reason that such fact was immaterial. The instructions requested by appellant withdrawing this issue from the jury should have been given.

2. That the appellee is precluded from asserting that the appellant was totally and permanently disabled at the time the insurance was granted because of the incontestable provision of the policy.

3. That the appellee is now estopped to assert the invalidity of the policy, having treated the contract in force and accepted benefits thereunder.

4. The essential facts not being in dispute, the court should have ordered judgment for the appellant upon the special verdict of the jury.

Respectfully submitted,

F. C. Struckmeyer,
I. A. Jennings,
Attorneys for Appellant.

No. 5916

In the United States Circuit Court of Appeals for the Ninth Circuit

JAMES W. JORDAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF OF APPELLEE

JOHN C. GUNG'L,
United States Attorney.

J. O'C. ROBERTS,
Assistant General Counsel.

JAMES T. BRADY,

LAWRENCE A. LAWLOR,
Attorneys, United States Veterans' Bureau.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5916

JAMES W. JORDAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The material facts may be briefly stated: The appellant, James W. Jordan, hereinafter called the insured, enlisted in the military service of the United States on February 5, 1918. On March 11, 1918, he applied for and there was granted to him $5,000 war risk term insurance. On June 1, 1918, he applied for and there was granted to him an additional $5,000 insurance. Premiums were paid through September, 1918. The insured was discharged September 4, 1918.

The insured in his complaint in Paragraph III alleged "that *prior to* and during the month of June, 1918, * * * plaintiff developed and became afflicted with epilepsy. That because of said

epilepsy plaintiff became on or about the 1st day of July, 1918, totally and permanently disabled * * *. (Emphasis ours.) (R. p. 3.)

The Government, defendant below and hereinafter called defendant, in its answer denied the foregoing allegations of the complaint. (Answer, Par. III, R. p. 8.)

At the conclusion of the testimony the Court charged the jury as follows:

> The policies provide that in the event the insured becomes totally and permanently disabled the United States will pay to him the sum of $57.50 per month, commencing at the date of such disability.
>
> Until the insured becomes totally and permanently disabled, it is necessary, to keep the policies in force, to pay the premiums thereon. In case the insured does become totally and permanently disabled while the policies are in force, then such disability matures the policy and no further premiums are required. (R. p. 18.)

The Court further instructed the jury:

> If you find that the plaintiff suffered from epilepsy between the dates of his entry into the service of the United States, February 5, 1918, and prior to the issuance to him of insurance by the Government, March 11, 1918, your verdict must be for the Government as to said contract of $5,000.00, for, if the plaintiff was suffering from the same affliction prior as after the insurance or the issuance of said insurance contract, he suf-

> fered no loss subsequent to the date of said contract. (R. p. 19.)

A like instruction was given as to the second contract which was issued effective June 1, 1918. (Bill of Exceptions, R. p. 20.)

Concluding his charge the Court submitted to the jury two special interrogatories:

> (1) Was the plaintiff permanently and totally disabled from epilepsy between the date of his entry into the service of the United States, February 5, 1918, and the date of his first insurance contract for $5,000?
>
> (2) Was the plaintiff permanently and totally disabled from epilepsy between the date of his entry into the service of the United States, February 5, 1918, and the date of his second insurance contract for $5,000?

With the submission of these two special interrogatories the Court instructed the jury that if their answer to the first interrogatory was in the affirmative—that is, that the plaintiff became permanently and totally disabled from epilepsy prior to the issuance of the first of the two insurance contracts—then the general verdict must be for the defendant, for "under those circumstances the plaintiff would have suffered no loss under the contract." The jury answered the first interrogatory in the affirmative and returned a general verdict for the defendant, on which judgment for the defendant was filed April 11, 1929.

ARGUMENT

The basic question in this case, stripped of its technical terminology, is this and nothing but this: Did the insured suffer loss under the contract? The insurance was granted "against death or total permanent disability" of the insured. (Section 400, Act of October 6, 1917, 40 Stat. 409.) The contract provided that the benefits of this insurance would be payable "to the insured, if he/she, while this insurance is in force, *shall become* totally and permanently disabled." (Bulletin No. 1, a regulation promulgated October 15, 1917, pursuant to Section 402 of the Act of October 6, 1917, 40 Stat. 409.)

It is plain, then, that the contract of insurance, as any other contract of insurance, was issued as an indemnity against future loss rather than against one which had already occurred. While the special interrogatory submitted to the jury was whether or not the insured was permanently and totally disabled prior to the respective dates of application for each contract of insurance, it is obvious that the inquiry of the Court was in effect directed to determining whether the insured's disability from epilepsy was incurred prior or subsequent to either or both of the applications for insurance, and it is equally obvious that the jury understood this to be the purpose of the court's inquiry, for the Court specifically called the attention of the jury to this matter in Instruction No. 1

and Instruction No. 2 requested by the defendant, in which the Court stated that if the insured was suffering "from the same affliction prior as after issuance of said insurance contract he suffered no loss subsequent to the date of the contract." (R. p. 12, 13.)

Regardless of the form, therefore, it is obvious that the jury found the insured suffered no loss covered by the insurance contracts during the time which they were kept in force and effect by the payment of premiums.

It will be noted that the record does not contain any suggestion that there was any evidence tending to show that there was any change or increase in the insured's disability from epilepsy during the period in controversy. On the contrary, the only inference that can be drawn from the record is that plaintiff's disability was the same during this entire period. In any event, no exception was noted to the court's ruling on this ground or any request that the jury be requested to make any finding regarding this matter.

The brief submitted in behalf of the insured does not specifically attempt to urge upon the Court that the insured is entitled to recover even though he suffered no loss during the life of the insurance contract, but attempts to evade that issue by asserting:

> 1. That the insured's physical condition at the time insurance was granted was immaterial;

2. That the policies became incontestable after expiration of six months; and

3. That the defendant is estopped to assert the invalidity of the policy.

The defendant admits that the insured's physical condition at the time insurance was granted is immaterial so far as the valid issue of a contract of insurance is concerned, but insists that the insured may not assert the identical condition which existed at the time insurance issued later constitutes a permanent and total disability.

After diligent search we have been unable to find any case in which insurance has been held payable for a loss occurring prior to the issue of insurance, except in certain well-known marine insurance cases, where insurance is issued against vessels expressly insured lost or not lost, and the loss is not known to either the insurer or the insured at the time such insurance is issued. It is well established, however, that if the loss be known to either party the insurance is void.

In the case of *Edward Martin Nold* v. *United States, unreported,* No. 1030 at Law, decided by the United States District Court for the Western District of Missouri, it appeared that the plaintiff while riding on horseback had fallen over a sharp declivity of nearly three hundred feet on November 3, 1917. From that time for a period of more than a year he was flat on his back in a hospital. On February 1, 1918, plaintiff made application for $10,000 war risk insurance. At the time of trial,

1928, the plaintiff, though still badly disabled, had some slight use of his arms and legs. The Court in directing a verdict for the Government said in part:

> If he (the plaintiff) was totally and permanently disabled after February 1, 1918, and is now totally and permanently disabled, witnesses' testimony that proves that, conclusively proves that he was totally and permanently disabled from the time of his injury, November 3, 1917. Concerning that no one can—concerning that conclusion no one can have any doubt at all; that is beyond argument.
>
> If he was totally and permanently injured after the date when he obtained this policy of insurance, February 1, 1918, he was totally and permanently disabled before that date, and from and after November 3, 1917, and for present purposes I will conclude that there is evidence to support that conclusion, to support the assumption that he was totally and permanently disabled soon after November 3, 1917.
>
> What, then, is the question which is now for determination? The question is, under facts of that kind is the plaintiff entitled to recover against the defendant, the Government? What did the Government insure him against? Against two things—death and against his becoming totally and permanently disabled. No one would contend, I suppose, that if by some trick of fate a policy of insurance were issued on a dead man, no one will contend that thereafter his

> beneficiaries could recover on that policy, because the insurance is against death after the policy and not before the policy is issued. The insurance here is against the plaintiff becoming totally and permanently disabled after he takes out the contract, not against a future of total and permanent disability which he had thereto.
>
> * * * * *
>
> A man can't—to use an illustration I have already used once—a man can't recover from a fire insurance company for the burning of a house when the house burned down before he got insurance; or for recovery on the loss of an arm on an accident policy when the arm was lost before he got insurance; nor from becoming totally and permanently disabled upon a war risk policy when he was totally and permanently disabled before he got the insurance.
>
> * * * * *
>
> My decision is not based upon the ground that the policy is contestable, but upon the ground that no loss has occurred, with reference to the time the policy was issued.

In the case of *Steve Oliver* v. *United States,* unreported, No. 254 at Law—Prescott, United States District Court for the District of Arizona, in directing a verdict for the defendant in a suit on a contract of war risk insurance, the Court said in part:

> I find that it becomes my duty, under the law and the evidence of this case, to instruct this jury to return a verdict in favor of the defendant, for the reason that the evidence

> fails to disclose a loss suffered by this plaintiff subsequent to the issuance of the policy. The evidence, in my judgment, shows that the plaintiff is in the same condition to-day that he was at the time that the policy was issued. The evidence of Dr. Allen was very clear and distinct on that. The evidence of Dr. McNally is to the effect that light employment would probably cure this plaintiff of the ailment existing prior to and at the time of the issuance of this policy, and this does not preclude the plaintiff from subsequently bringing an action on the policy, if he suffers a total and permanent disability from any cause arising subsequent to the 1st of November, 1925 (date of reinstatement of lapsed insurance).

In the case of *McCain* v. *Hartford Live Stock Ins. Co.,* 130 S. E. 186, 190 N. C. 549, a contract of insurance was issued covering the life of a mule which died two days before the policy was delivered and before it was countersigned. The Supreme Court of North Carolina, in holding that there could be no recovery under the policy, said in part:

> Parties would not knowingly make an insurance contract regarding a mule not in existence. The thing contemplated to exist and whose existence was an indispensable basis for their contemplated agreement had no existence; therefore there was no contract.

The attention of the Court is specifically invited to the fact that it is not the defendant in this case

who in the first instance asserted or made claim that the insured's condition from epilepsy was one of permanent and total disability. On the contrary, it is the insured who has asserted that he was permanently and totally disabled by reason of epilepsy on July 1, 1918. The record is silent as to whether or not the evidence as to the insured's condition was introduced by him or by the defendant. However, no objection seems to have been made by either party to the admission or exclusion of evidence and the petition of the insured alleges that his epilepsy developed on and prior to June, 1918. The second contract of insurance issued June 1, 1918. It was the contention of the Government that the insured was not permanently and totally disabled at any time while his insurance remained in force by reason of epilepsy or any other disease. The defendant contended, however, that the epileptic condition which existed on July 1, 1918, existed prior to issue of either of the contracts of insurance to the insured and that if such condition constituted a permanent total disability on July 1, 1918, then the same condition constituted a permanent and total disability prior to February 5, 1918; that the plaintiff could not assert as a permanent total disability a condition which existed prior to the issue of insurance because such insurance contemplated that the insured was an insurable risk against permanent and total disability and that he could not be heard to assert the condition existing prior to

the issue of the insurance constituted a permanent and total disability.

The insured has attempted and is now attempting to assert that even though permanently and totally disabled prior to the issuance of the insurance he may assert liability under a contract issued after such disability was incurred. In other words, the insured is attempting at the same time and by the same evidence to prove that he was permanently and totally disabled and also that he was not permanently and totally disabled.

The second contention of the insured, that the policies are incontestable after six months, is not involved in this case.

From what has been said above it is obvious that the Government is not attempting to contest the validity of the contracts issued. It is the position of the Government that the contracts were validly issued and that the insured had protection against permanent total disability during the time that these contracts were kept in force by the payment of premiums, but that no loss occurred during such time. Consequently, neither argument of counsel nor the cases cited with reference to the incontestability of insurance have any bearing upon the issues in this case.

The third argument of the insured, to the effect that the defendant is estopped to assert the invalidity of the policy, is not involved. As stated above, the Government is not asserting the invalid-

ity of the policy. It is admitted that the insured had two valid contracts of insurance, but it is denied that any loss was incurred during the lifetime of such insurance contracts by reason of which the insured is entitled to recover thereunder.

Only two points raised by the insured's brief remain:

(1) The refusal of the Court to give Instructions No. 1 and No. 2 requested by the insured. The material parts of the insured's requested instructions were included in the general charge of the Court to the jury, except the items that the policy was incontestable and that the defendant was estopped from asserting the insured was permanently and totally disabled prior to the issue of insurance. As has been shown above, the questions as to the incontestability of the insurance and the estoppel against the defendant to assert a permanent and total disability prior to the issuance of the insurance were not involved in this case, and there is no reason why the Court should have given instructions not pertinent to the issue even though such instructions might have clearly stated the law, if applicable.

(2) The refusal of the court to grant the motion of judgment for the insured or the special verdict. The special verdict, as has been shown above, in effect merely established the fact that the insured was in the same condition prior to the time he first secured the insurance in question as he was at the

time when he alleged a permanent total disability existed. In other words, the verdict of the jury merely found that the insured suffered no loss during the lifetime of his insurance contracts. On the special and general verdicts returned by the jury the Court properly entered judgment in behalf of the Government.

For the reasons above stated it is respectfully submitted that no error was committed in the trial and the judgment of the Trial Court should be sustained.

Respectfully submitted.

JOHN C. GUNG'L,
United States Attorney.

Of Counsel:

J. O'C. ROBERTS,
Assistant General Counsel.
JAMES T. BRADY,
LAWRENCE A. LAWLOR,
Attorneys,
United States Veterans' Bureau.

U. S. GOVERNMENT PRINTING OFFICE: 1929

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY A. JENSEN,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

Transcript of Record

Names and address of Attorneys of Record:

GEORGE NEUNER,
United States Attorney,
FRANCIS E. MARSH,
Assistant United States Attorney,
Federal Building, Portland, Oregon.
For Appellant.

B. A. GREEN,
Corbett Building, Portland, Oregon.
For Appellee.

The Adam Printing Co., Portland, Ore. 8-10-29 40

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Assistant United States Attorney,

Federal Building, Portland, Oregon.

For Appellant.

B. A. GREEN,

Corbett Building, Portland, Oregon.

For Appellee.

In the District Court of the United States for the District of Oregon

L-10516

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

United States of America,
District of Oregon } ss.

CITATION ON APPEAL

To HENRY A. JENSEN and his attorney, B. A. GREEN, Greetings:

WHEREAS the United States of America has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States for the District of Oregon in your favor and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereto to show cause, if any there be, why the judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said District this 2nd day of August in the year of our

Lord One Thousand Nine Hundred Twenty-nine.

JOHN H. McNARY,

Judge.

United States of America,
District of Oregon } ss.

Due and legal service of the within CITATION ON APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

In the District Court of the Untied States for the District of Oregon, November term, 1928.

Be it Remembered, That on the 22d day of January, 1929, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I.

That plaintiff is now a resident and inhabitant of the State of Oregon and a citizen of the United States of America.

II.

That heretofore and during the year 1917 plaintiff served with the Military Forces of the United States of America, and on or about November 17, 1917, made application for and there was issued to the plaintiff a policy of War Risk Insurance in the sum of $10,000.00, conditioned that the said defendant would pay to the plaintiff the sum of $57.50 per month should a condition of permanent and total disability arise as defined by law, and thereafter the premiums on said policy were paid to and including the month of May, 1919, and thereafter and on June 2, 1927, plaintiff made application for the reinstatement and

conversion of the full amount of his policy of War Risk Insurance, which policy had lapsed on or about June 30, 1919, and complied with all the rules and regulations of the Veterans Bureau with respect to physical examination and upon the date of the application for reinstatement and conversion plaintiff was receiving compensation for a service connected disability, and at the time of said application for reinstatement and conversion plaintiff was suffering a degree of disability less than permanent total and with said application plaintiff made payment of the back premium of said lapsed insurance with interest at 5% per annum, and there was issued to the plaintiff a five- year convertible policy of government life insurance effective July 1, 1927.

III.

That after said date of the issuance of said policy of insurance plaintiff's mental and physical condition deteriorated from the disease from which he was suffering, to-wit: chronic nephritis, and said disease became more severe and plaintiff alleges that on or about December 7, 1927, said disease had progressed to the point where plaintiff became permanently and totally disabled and plaintiff alleges that this condition of permanent, total disability has continued since December 7, 1927, and will continue throughout his life.

IV.

That after said date of reinstatement and conversion, plaintiff paid the monthly premiums due on his policy, as provided by law, until for the month of January, 1928, at which time he was advised by the United States Veterans Bureau that his condition was that of one permanently and totally disabled and that further payments on his policy need not be made; that thereafter and subsequent to the allowance to said defendant of the award of permanent and total disability the said defendant failed and refused and now fails and refuses to pay said plaintiff under the terms and pursuant to the provisions of said policy of insurance and has disagreed with the said plaintiff as to his claim and now disagrees with said plaintiff as to his claim.

WHEREFORE, plaintiff prays for judgment and decree of this Court that he was upon December 7, 1927, permanently and totally disabled and will ever be, and that he recover from said defendant the sum of $57.50 per month from the date of his permanent, total disability; and for plaintiff's costs and disbursements incurred herein.

B. A. GREEN,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah } ss.

I, Henry A. Jensen, being first duly sworn, depose and say that I am plaintiff in the above entitled cause; and that the foregoing Complaint is true as I verily believe.

HENRY A. JENSEN

Subscribed and sworn to before me this 18th day of January, 1929.

B. A. GREEN,
Notary Public for Oregon.
(SEAL) My Commission expires Mar 6, 1932

State of Oregon,
County of Multnomah } ss.

Due service of the within Complaint is hereby accepted in Multnomah County, Oregon, this 22nd day of January, 1929, by receiving a copy thereof, duly certified to as such by B. A. Green, attorney for plaintiff.

GEORGE NEUNER,
U. S. Attorney.
By CHAS. W. ERSKINE,
Asst. U. S. Attorney.

Endorsed:
U. S. DISTRICT COURT
District of Oregon

Filed Jan. 22, 1929
G. H. Marsh, Clerk
B Deputy

And afterwards, to-wit, on the 25th day of March, 1929, there was duly filed in said Court, a Motion to Strike, in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

MOTION TO STRIKE

Comes now the defendant above-named by George Neuner, United States Attorney for the District of Oregon, and Francis E. Marsh, Assistant United States Attorney, and moves the Court that an order be entered herein requiring the plaintiff to strike the following portions of the complaint heretofore filed herein for the reason hereinafter stated:

Those portions of Paragraph IV of said Complaint reading as follows:

> "at which time he was advised by the United States Veterans Bureau that his condition was that of one permanently and totally disabled

and that further payments on his policy need not be made; that thereafter and subsequent to the allowance to said defendant of the award of permanent and total disability."

for the reason that the same constitutes a pleading of evidence.

GEORGE NEUNER,
United States Attorney
for the District of Oregon.
FRANCIS E. MARSH,
Assistant United States Attorney.

United States of America,
District of Oregon } ss.

Due and legal service of the within Motion to Strike is hereby admitted and accepted within the State and District of Oregon, on the 25th day of March, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,
W
Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT
District of Oregon
Filed Mar. 25, 1929

G. H. Marsh, Clerk
B

And afterwards, to-wit, on the 11th day of April, 1929, there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

STIPULATION

It is hereby stipulated by and between B. A. Green, attorney for plaintiff, and Francis E. Marsh, Assistant United States Attorney for the District of Oregon, that the following may be stricken from plaintiff's complaint on file herein:

Paragraph IV, Page 2, beginning on Line 22 and ending on Line 27, the following:

> "at which time he was advised by the United States Veterans Bureau that his condition was that of one permanently and totally disabled and that further payments on his policy need not be made; that thereafter and subsequent to the allowance to said defendant of the award of permanent and total disability."

Dated at Portland, Oregon, this 8th day of April, 1929.

B. A. GREEN,
Attorney for Plaintiff,
FRANCIS E. MARSH,
Assistant United States Attorney.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 11, 1929
G. H. Marsh, Clerk
K

And afterwards, to-wit, on Thursday, the 11th day of April, 1929, the same being the 30th Judicial day of the regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

ORDER TO STRIKE

THIS MATTER coming on to be heard on the stipulation heretofore filed herein, the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the following

be, and the same is hereby, stricken from the complaint on file herein:

From Paragraph IV, Page 2, beginning on Line 22 and ending on Line 27, the following:

> "at which time he was advised by the United States Veterans Bureau that his condition was that of one permanently and totally disabled and that further payments on his policy need not be made; that thereafter and subsequent to the allowance to said defendant of the award of permanent and total disability."

Dated at Portland, Oregon, this 11th day of April, 1929.

JOHN H. McNARY,
District Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 11, 1929
G. H. Marsh, Clerk
K

And afterwards, to-wit, on the 8th day of April, 1929 there was duly filed in said Court, an Answer in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

ANSWER

COMES NOW the United States of America, by George Neuner, United States Attorney for the District of Oregon, and Francis E. Marsh, Assistant United States Attorney, and for answer to plaintiff's complaint, admits, denies, and alleges:

I.

That the defendant has no knowledge or information sufficient to form a belief relative to the allegations contained in Paragraph I of the complaint, and therefore denies the same.

II.

Defendant denies each and every allegation contained in Paragraph II of the complaint, except that defendant admits that heretofore, and during the year 1917, plaintiff served with the military forces of the United States of America, and on or about November 17, 1917, made application for and there was issued to the plaintiff a policy of war risk insurance in the sum of Ten Thousand ($10,000) Dollars, conditioned that the said defendant would pay to the plaintiff the sum of Fifty-Seven and 50/100 ($57.50) Dollars per month, should a condition of permanent and total disability arise, as defined by law, while said

policy of war risk insurance was in full force and effect, and thereafter the premiums on said policy were paid to and including the month of May, 1919, and thereafter, and on June 2, 1927, plaintiff made application for reinstatement and conversion of the full amount of his policy of war risk insurance, which policy had lapsed on or about June 30, 1919.

III.

Denies each and every allegation contained in Paragraph III of the complaint.

IV.

Admits each and every allegation contained in Paragraph IV of the complaint.

For a further and separate answer and defense to plaintiff's complaint, defendant alleges:

I.

That on June 2, 1927, plaintiff applied for reinstatement and conversion of the said Ten Thousand ($10,000) Dollars of War Risk Insurance, which had lapsed, as aforesaid, and said application was tentatively accepted by the Director of the United States Veterans Bureau, and a five-year convertible policy of government life insurance was tentatively issued to plaintiff, effective July 1, 1927.

II.

That at the time plaintiff filed said application and at the time the same was tentatively accepted and granted, plaintiff was suffering from disability due to his military service and was rated less than permanently and totally disabled by the Veterans Bureau.

III.

That under the provisions of Section 304 of the World War Veterans Act and the regulations promulgated thereunder, plaintiff, to be entitled to reinstate or reinstate and convert his said war risk insurance, among other things, was required to submit proof satisfactory to the Director of the Veterans Bureau, that he was not permanently and totally disabled.

IV.

That at the time plaintiff filed his said application, as aforesaid, and at the time same was tentatively accepted and granted, the evidence submitted to the Director of the Veterans Bureau by plaintiff and in possession of said Director was insufficient to show to the satisfaction of said Director that plaintiff was not totally and permanently disabled; that plaintiff was therefore reexamined by the Veterans Bureau, and on December 8, 1927, was rated permanently and totally disabled as of December 7, 1927; that, as a result

of said examination, it was subsequently and on the 5th day of May, 1928, finally determined by the Director of the United States Veterans Bureau that plaintiff was permanently and totally disabled from the 19th day of August, 1926.

V.

That by reason of the fact that plaintiff was permanently and totally disabled at the time he filed his said application for reinstatement and conversion, as aforesaid, and at the time the same was tentatively accepted and a five-year convertible policy of government life insurance tentatively issued to him, plaintiff was not entitled either to reinstate or to convert his war risk insurance, and the action of the Veterans Bureau in tentatively reinstating said war risk insurance and tentatively issuing said policy was contrary to law and void, and plaintiff had no war risk insurance or government life insurance in force and effect at any time subsequent to June 30, 1919.

VI.

That on June 14, 1928, plaintiff was advised that the action of the Veterans Bureau, reinstating and converting said insurance was erroneous, contrary to law, and void, and that the same had been cancelled. Upon cancelling the said reinstatement and conversion, the Veterans Bureau

returned all premiums tendered by plaintiff by reason of plaintiff's said admitted reinstatement and conversion of his said war risk insurance.

WHEREFORE, defendant, having fully answered plaintiff's complaint, demands that plaintiff take nothing thereby and that the defendant go hence without day and recover of and from the plaintiff its costs and disbursements incurred herein.

GEORGE NEUNER,
United States Attorney for the District of Oregon
FRANCIS E. MARSH,
Assistant United States Attorney.

United States of America,
District of Oregon } ss.

I, Francis E. Marsh, being first duly sworn, depose and say:

That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I am possessed of information from which I have prepared the foregoing Answer, and that the allegations contained therein are true, as I verily believe.

FRANCIS E. MARSH

Subscribed and sworn to before me this 5th

day of April, 1929.

J. W. McCULLOCH,
Notary Public for Oregon.

(SEAL) My Commission Expires Dec. 23, 1930.

United States of America, }
} ss.
District of Oregon }

Due and legal service of the within Answer is hereby admitted and accepted within the State and District of Oregon, on the 8th day of April, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. Green,
W
Attorney for Plaintiff

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 8, 1929
G. H. Marsh, Clerk
B

AND afterwards, to-wit, on the 10th day of April, 1929, there was duly filed in said Court, a Demurrer in words and figures as follows, to-wit:

No. L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

DEMURRER

COMES NOW the plaintiff and files this as a demurrer to the further and separate answer and defense of the defendant filed herein, on the ground and for the reason that the things and matters therein set forth do not constitute a defense to the cause of action as alleged in plaintiff's complaint.

B. A. GREEN,
Attorney for Plaintiff.

Service accepted this 10th day of
April, 1929.
J. W. McCULLOCH,
Of attorneys for defendant.
Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 10, 1929
G. H. Marsh, Clerk
B

And afterwards, to-wit, on Wednesday, the

17th day of April, 1929, the same being the 34th judicial day of the regular March Term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

No. L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

ORDER

This cause having come on to be heard before the Hon. Robert S. Bean, Judge of the above entitled court, upon this, the 15th day of April, 1929, upon a demurrer as filed by the plaintiff to the answer of the defendant on the ground and for the reason that the same failed to state facts sufficient to constitute a defense to the cause of action alleged in plaintiff's complaint, plaintiff appearing in court at this time by his attorney, B. A. Green, and defendant appearing in court by Francis E. Marsh, Assistant United States Attorney, and the court being advised in the premises,

IT IS ORDERED AND ADJUDGED that said demurrer be and the same is hereby sustained,

and said defendant is given ten (10) days to further answer and plead herein.

AND IT IS SO ORDERED.

Dated this 17th day of April, 1929.

R. S. BEAN,

Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 17, 1929
G. H. Marsh, Clerk

And afterwards to-wit, on the 8th day of May, 1929 there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between Francis E. Marsh, Assistant United States Attorney for the District of Oregon, and B. A. Green, Attorney for the Plaintiff herein, that Paragraph III of Defendant's Answer in the above-entitled case may be amended to read as follows:

"Denies each and every allegation of Paragraph III of plaintiff's complaint, except that defendant admits that plaintiff was permanently and totally disabled on December 7, 1927, and defendant further alleges that plaintiff was permanently and totally disabled on August 19, 1926, and that the Director of the United States Veterans Bureau has found that plaintiff was permanently and totally disabled on said date."

FRANCIS E. MARSH,
Assistant United States Attorney
for the District of Oregon.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed May 8, 1929
G. H. Marsh, Clerk
K

And afterwards, to-wit, on Wednesday, the 8th day of May, 1929, the same being the 51st judicial day of the regular March Term of said Court, present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

ORDER

Based upon the Stipulation filed herein, IT IS HEREBY ORDERED that Paragraph III of Defendant's Answer herein may be amended to read as follows:

> "Denies each and every allegation of Paragraph III of plaintiff's complaint, except that defendant admits that plaintiff was permanently and totally disabled on December 7, 1927, and defendant further alleges that plaintiff was permanently and totally disabled on August 19, 1926, and that the Director of the United States Veterans Bureau has found that plaintiff was permanently and totally disabled on said date."

JOHN H. McNARY,
Judge.

Endorsed:

U. S. DISTRICT COURT
District of Oregon

Filed May 8, 1929
G. H. Marsh, Clerk
K

And afterwards, to-wit, on the 8th day of May, 1929 there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

STIPULATION

IT IS HEREBY STIPULATED by and between Francis E. Marsh, Assistant United States Attorney for the District of Oregon, who appears on behalf of the defendant, and B. A. Green, Attorney for the plaintiff herein, that the above-entitled case may be tried and determined by the Court without the intervention of a jury.

FRANCIS E. MARSH,
Assistant United States Attorney
for the District of Oregon.
Attorney for Defendant.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT
District of Oregon

Filed May 8, 1929
G. H. Marsh, Clerk

And afterwards, to-wit, on Monday, the 17th day of June, 1929, the same being the 81st judicial day of the regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

No. L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

AMENDED JUDGMENT

This cause coming on for trial before the Hon. Judge McNary, Judge of the above entitled Court, upon the 8th day of May, 1929, being the day regularly set therefor, the said plaintiff and defendant having heretofore stipulated in writing, which stipulation was filed with the Clerk, that a jury be waived in said cause, and that the matter be heard before the Court without the intervention of a jury, and the Court having heard the opening statement of the respective counsel, and having heard the testimony on behalf of the plaintiff, defendant waiving testimony to be produced, the Court does find and enter its verdict that plaintiff was, upon the 7th day of December, 1927, permanently and totally disabled, and that said

re-instated and converted policy was, on December 7, 1927, in full force and effect; and

It appearing from the stipulation and statements of the counsel for the plaintiff and counsel for the defendant, that said policy so converted and so reinstated in the sum of Ten Thousand ($10,000.00) Dollars, was and is subject to a lien in the sum of $798.33, the balance due thereon being $9201.67, and based upon said verdict and upon said stipulation of said respective counsel,

IT IS ORDERED AND ADJUDGED that plaintiff do have and recover judgment against the defendant for the full sum of $52.91 per month, from December 7, 1927, in all the sum of $952.38, and that plaintiff receive such payments thereunder, as made and provided by law, and the Court does find that $1000.00 is a reasonable sum to be allowed to B. A. Green, as attorney's fees in said cause, to be paid to said B. A. Green as made and provided by law; and

IT IS FURTHER ORDERED that said judgment as heretofore entered and filed in this Court on the 8th day of May, 1929, be and the same is hereby vacated, and set aside, and this judgment is entered as the judgment in said above entitled cause.

AND IT IS SO ORDERED.

Dated this 17th day of June, 1929.

JOHN H. McNARY,

Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed June 17, 1929
G. H. Marsh, Clerk
K

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Petition for Order of Appeal in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

PETITION FOR ORDER OF APPEAL

The above-named defendant, United States of America, conceiving itself aggrieved by the judgment filed and entered on the 17th day of June, 1929, in the above-entitled action does hereby appeal from said judgment and the whole thereof to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reason and upon

the ground specified in the assignments of error filed herewith and prays that this, its appeal, be allowed; that a citation issue as provided by law and that a transcript of the record and proceedings in said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit sitting at San Francisco, California.

Dated at Portland, Oregon, this 2nd day of August, 1929.

GEORGE NEUNER,
United States Attorney for the District of Oregon.
FRANCIS E. MARSH,
Assistant United States Attorney

United States of America, }
} ss.
District of Oregon }

Due and legal service of the within PETITION FOR ORDER OF APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on Friday, the 2nd day og August, 1929, the same being the 24th judicial day of the regular July Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

ORDER ALLOWING APPEAL

UPON THE PETITION OF the United States of America, defendant in the above-entitled cause, IT WAS ORDERED that the appeal of said defendant from the judgment herein to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed.

Dated at Portland, Oregon, this 2nd day of August, 1929.

JOHN H. McNARY,
Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Notice of Appeal in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

NOTICE OF APPEAL

To the above-named Plaintiff HENRY A. JENSEN, and his Attorney, B. A. GREEN:

You and each of you will take notice that the defendant, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment and decree made and entered in the above-entitled cause and Court and signed by Honorable John H. Mc-

Nary, one of the Judges of said District Court, on the 17th day of June, 1929, which judgment and decree were and are to the effect that plaintiff herein, Henry A. Jensen, became totally and permanently disabled on the 7th day of December, 1927, and ever since said date has been and now is permanently and totally disabled and that there is due and owing said Henry A. Jensen on a policy of Converted Insurance carried by said plaintiff, a sum equal to the accrued payments of $52.91 per month from the 7th day of December, 1927, being in all the sum of $952.38, and the defendant appeals from the whole of said judgment and decree.

Dated this 2nd day of August, A. D., 1929.

GEORGE NEUNER,
United States Attorney for the
District of Oregon
FRANCIS E. MARSH
Assistant United States Attorney

United States of America,
District of Oregon } ss.

Due and legal service of the within NOTICE OF APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct

copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, Assignments of Error in words and figures as to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

ASSIGNMENTS OF ERROR

The United States of America being the defendant in the above-entitled cause and appearing by George Neuner, United States Attorney for the District of Oregon, and Francis E. Marsh, Assistant United States Attorney, and having filed

a Notice of Appeal as required by law, that the defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment made and entered in said cause against said defendant herein, now makes and files in support of said appeal the following assignments of error upon which it will rely for a reversal of said final order and judgment upon the said appeal, and which said error is to the great detriment, injury and prejudice of this defendant, and said defendant says that in the records and proceedings upon the hearing and determination thereof in the District Court of the United States for the District of Oregon, there is a manifest error in this, to-wit:

I.

That the Court erred in sustaining the demurrer of the plaintiff to the further and separate answer and defense contained in defendant's answer to plaintiff's complaint.

II.

That the Court erred in denying the admission of proof to substantiate the allegations contained in defendant's further and separate answer as appear in Exception Number 1.

WHEREFORE, on account of the error above assigned, the defendant prays that the judgment

of this Court be reversed and that this cause be remanded to the said District Court and that such directions be given that the above errors may be corrected and law and justice be done in the matter.

Dated at Portland, Oregon, this 2nd day of August, 1929.

GEORGE NEUNER,
United States Attorney for the District of Oregon.
FRANCIS E. MARSH,
Assistant United States Attorney

United States of America,
District of Oregon } ss.

Due and legal service of the within ASSIGNMENTS OF ERROR is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon

Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Bill of Exceptions in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

BILL OF EXCEPTIONS

BE IT REMEMBERED that the above-entitled case came on to be heard before the Honorable John H. McNary, Judge of the above-entitled Court, on the 8th day of May, 1929, without a jury, and the plaintiff being represented by his attorney, B. A. Green, and the defendant by its attorney, Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

WHEREUPON, the following proceedings, among others were had:

MR. GREEN: My understanding is that counsel for the Government will stipulate that

no proof is necessary with respect to the fact that Henry A. Jensen was upon December 7th, 1927, permanently and totally disabled.

MR. MARSH: We will do that; we will stipulate to that effect.

MR. GREEN: Let the record show that the stipulation is entered in open court. Then the plaintiff rests, Your Honor.

MR. MARSH: If the Court please, the defendant for the sake of the record offers to prove the following facts: First, that on June 2nd, 1927 plaintiff applied for ten thousand dollars war risk insurance, which lapsed— —

MR. GREEN: (interrupting) Just a minute; he didn't apply for ten thousand dollars war risk insurance — — it wasn't war risk insurance.

MR. MARSH: Reinstatement of the insurance which had lapsed, and said policy of war risk insurance became effective July 1st, 1927. Second, that at the time plaintiff filed his application for reinstatement and conversion he was suffering from a disability due to military service and was

rated less than permanently and totally disabled by the Veterans' Bureau. Third, that under the provisions of Section 304 of the World War Veterans' Act and the regulations promulgated thereunder, plaintiff, to be entitled to reinstate or reinstate and convert his said war risk insurance, among other things, was required to submit proof satisfactory to the Director of the Veterans' Bureau, that he was not permanently and totally disabled. Fourth, that at the time plaintiff filed his application for reinstatement and conversion of his policy, and at the time the same was tentatively accepted and granted, the evidence submitted to the Director of the Veterans' Bureau by plaintiff and in possession of said Director was insufficient to show to the satisfaction of said Director that plaintiff was not totally and permanently disabled; that plaintiff was therefore reexamined by the Veterans' Bureau, and on December 8th, 1927, was rated permanently and totally disabled as of December 7th, 1927; that, as a result of said examination, it was subsequently, and on the 5th day of May, 1928, finally determined by the Director of the United States Veterans' Bureau that

plaintiff was permanently and totally disabled from the 19th day of August, 1926. Fifth, that by reason of the fact that plaintiff was permanently and totally disabled at the time he filed his said application for reinstatement and conversion, as aforesaid, and at the time the same was tentatively accepted and a five-year convertible policy of government life insurance tentatively issued to him, plaintiff was not entitled either to reinstate or to convert his war risk insurance, and the action of the Veterans' Bureau in tentatively reinstating said war risk insurance and tentatively issuing said policy was contrary to law and void, and plaintiff had no war risk insurance or government life insurance in force and effect at any time subsequent to June 30th, 1919. Sixth, that on June 14th, 1928, plaintiff was advised that the action of the Veterans' Bureau, reinstating and converting said insurance was erroneous, contrary to law, and void, and that the same had been cancelled— —

THE COURT: (interrupting) Don't you want to introduce evidence sustaining the allegations of your answer?

MR. MARSH: I am about through now. Upon cancelling the said reinstatement and conversion, the Veterans' Bureau returned all premiums tendered by plaintiff by reason of plaintiff's said admitted reinstatement and conversion of his said war risk insurance. Those are the allegations in our affirmative answer, and we would like to offer proof on that answer. That is the one that was stricken by Judge Bean on the demurrer.

MR. GREEN: At this time the plaintiff objects to the offer of proof, upon the ground that the same is incompetent, irrelevant, and immaterial, and not within the issues and pleadings of this case, and not tending to prove or disprove any issue of the pleadings in this case, and upon the further ground that the offer of proof as made by the defendant constitutes an offer of proof to prove the allegations of the further and separate answer of the defendant, to which further and separate answer a demurrer was heretofore filed, and upon argument thereof the demurrer was sustained, and by order of the court said further and separate answer was stricken, and therefore the offer of proof

as made at this time by the defendant is not within the issues of the pleadings of this case.

THE COURT: In view of the holding of Judge Bean in sustaining the demurrer to the answer of defendant, I will sustain the objection.

MR. MARSH: We may note an exception?

THE COURT: An exception is noted.

IT IS HEREBY CERTIFIED that the foregoing proceedings were had upon the trial in this cause, and that the Bill of Exceptions contains all the evidence relative to or necessary to an understanding of the foregoing objection and exception.

IT IS FURTHER CERTIFIED that the foregoing exception asked or taken by the defendant was allowed by the Court and this Bill of Exceptions was duly presented and filed within the time fixed by law and the orders of this court and is by me duly allowed and signed this 2nd day of August, 1929.

JOHN H. McNARY,
One of the Judges of the District Court of the United States for the District of Oregon.

O. K.
B. A. GREEN,
Attorney for Plaintiff.
Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

STIPULATION

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled action that the record and transcript to be prepared by the Clerk of the Court and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit shall consist of the following:

Citation on Appeal
Complaint
Motion to Strike
Stipulation to Strike
Order to Strike
Answer
Demurrer
Order Sustaining Demurrer
Stipulation to Amend Answer
Order Permitting Answer to be Amended
Stipulation Waiving Jury
Amended Judgment
Petition for Order of Appeal
Order Allowing Appeal
Notice of Appeal
Assignments of Error with Endorsements thereon
Bill of Exceptions with Endorsements thereon
This Stipulation
Praecipe for Record to be prepared by Clerk.

B. A. GREEN,
Attorney for Plaintiff.
FRANCIS E. MARSH,
Assistant United States Attorney
for the District of Oregon.

Endorsed:
U. S. DISTRICT COURT
District of Oregon

Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Praecipe in words and figures as follows, to-wit:

L-10516

In the District Court of the United States for the District of Oregon

Henry A. Jensen, Plaintiff,
vs.
United States of America, Defendant

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said appellate Court and especially including therein the following documents:

Citation on Appeal
Complaint
Motion to Strike

Stipulation to Strike

Order to Strike

Answer

Demurrer

Order Sustaining Demurrer

Stipulation to Amend Answer

Order Permitting Answer to be Amended

Stipulation Waiving Jury

Amended Judgment

Petition for Order of Appeal

Order Allowing Appeal

Notice of Appeal

Assignments of Error with Endorsements thereon

Bill of Exceptions with Endorsements thereon

Stipulation

This Praecipe for Record to be Prepared by Clerk.

Dated at Portland, Oregon, this 2nd day of August, 1929.

FRANCIS E. MARSH,
Assistant United States Attorney.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

No. 5017

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY A. JENSEN, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

GEORGE NEUNER,
United States Attorney.

FRANCIS E. MARSH,
Assistant United States Attorney.

WILLIAM WOLFF SMITH,
General Counsel.

J. O'C. ROBERTS,
Assistant General Counsel.

JAMES T. BRADY,
Attorney, United States Veterans' Bureau.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY A. JENSEN, APPELLEE

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF THE CASE

Henry A. Jensen, plaintiff below and hereinafter called plaintiff, was granted $10,000 war risk term insurance while in the military service of the defendant. This insurance lapsed for nonpayment of the premium for the month of June, 1919. On June 2, 1927, the plaintiff applied to the United States Veterans' Bureau for reinstatement and conversion of this lapsed insurance in the full amount. The application was accepted, and effective July 1, 1927, there issued to the plaintiff a five-year convertible term policy in the amount of $10,000. Premiums on this policy were paid by the plaintiff until for the month of January, 1928. The plaintiff became permanently and totally disabled at least as early as December 7, 1927. None of the

foregoing facts are in dispute. The United States Veterans' Bureau by action taken on December 8, 1927, rated the plaintiff permanently and totally disabled as of December 7, 1927, and on May 5, 1928, the Director of the United States Veterans' Bureau determined that permanent and total disability existed from and after the 19th day of August, 1926, which was a date prior to the application for and issuance of the convertible term policy. (Par. IV, further and separate answer, R. 18, 19.) On June 14, 1928, the plaintiff was advised that his policy had been cancelled, and all premiums paid by plaintiff were returned to him. (Par. VI, further and separate answer, R. 19, 20.)

The plaintiff filed a demurrer to the further and separate answer of the defendant on the ground that same did not constitute a defense to the complaint. (R. 22.) The demurrer was sustained by order entered April 17, 1929. (R. 23.) A jury was waived in writing. (R. 27.) At the trial the defendant stipulated that plaintiff was permanently and totally disabled on December 7, 1927, and thereupon the plaintiff rested. (Bill of Exceptions, R. 39.)

The defendant then offered to prove that on December 8, 1927, the Veterans' Bureau rated the plaintiff permanently and totally disabled as of December 7, 1927; that on the 5th day of May, 1928, it was finally determined by the Director of the United States Veterans' Bureau that plaintiff

was permanently and totally disabled from the 19th day of August, 1926; that on June 14, 1928, plaintiff was advised that the action of the Veterans' Bureau in reinstating and converting said insurance was erroneous, contrary to law, and void; that the policy of converted insurance was cancelled; that the premiums tendered by plaintiff were returned to the plaintiff. (Bill of Exceptions, R. 40, 41, 42.)

To this offer of proof the plaintiff objected. (R. 42.) The objection was sustained (R. 43), and an exception taken by the defendant and noted by the Court (R. 43). Judgment for the plaintiff awarding installments of $52.91 per month from December 7, 1927, was filed June 17, 1929. From this judgment the defendant is here on appeal.

ASSIGNMENTS OF ERROR

I

That the Court erred in sustaining the demurrer of the plaintiff to the further and separate answer and defense contained in defendant's answer to plaintiff's complaint.

II

That the Court erred in denying the admission of proof to substantiate the allegations contained in defendant's further and separate answer as appear in Exception Number I.

That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. (Section 402 of the Act of October 6, 1917, 40 Stat. 409.)

Not later than five years after the date of the termination of the war, as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. (Section 404 of the Act of October 6, 1917, 40 Stat. 410.)

This insurance is subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract. (Regulation, Bulletin No. 1, promulgated October 15, 1917.)

In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this

amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. (Section 304 of the World War Veterans' Act 1924, as amended, 44 Stat. 799.)

Subject to the provisions of section 29 of the War Risk Insurance Act and amendments thereto policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums. (Section 411 of the War Risk Insurance Act as amended by the Act of August 9, 1921, 42 Stat. 157.)

All such policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums and subject to the provisions of section 23: *Provided,* That a letter mailed by the bureau to the insured at his last known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section: *Provided further,* That this section shall be

deemed to be in effect as of April 6, 1917. (Section 411 of the War Risk Insurance Act as amended March 4, 1923, 42 Stat. 1527; now Section 307 of the World War Veterans' Act 1924, 43 Stat. 627.)

ARGUMENT

The questions in this case are:

> Did the happening of the contingency insured against within six months from date of issuance of the reinstated policy, and so found by the Veterans' Bureau within such six months, operate to suspend the incontestable clause provided in Section 307?

And if it did—

> Did the finding of the Director on May 5, 1928 (more than six months subsequent to the reinstatement of the policy), that the plaintiff was permanently and totally disabled from August 19, 1926 (prior to the reinstatement of the policy), together with the fact that on June 14, 1928, plaintiff was advised of the cancellation of his policy and his premiums returned, as was alleged in the further and separate answer of the defendant, constitute a defense?

The answers to these questions turn on the interpretation of the language "has been in force," as found in Section 307, quoted herein at page 4, and the sufficiency of the allegations of the defendant's further and separate answer. (R. 17–20.)

A restatement of the material admitted facts is:

July 1, 1927. Issuance of the reinstated policy.

December 7, 1927. Existence of permanent and total disability as determined by defendant and admitted by plaintiff.

May 5, 1928. A finding of permanent and total disability by the Director of the United States Veterans' Bureau effective as of August 19, 1926.

June 14, 1928. Plaintiff notified of cancellation of policy and premiums returned to plaintiff.

Section 411 of the War Risk Insurance Act, which was enacted on August 9, 1921 (42 Stat. 157), provided that the policy, with certain exceptions, became incontestable after six months *from date of issuance or reinstatement.*

When the Bureau came to apply this Section it was found that it was held in a large number of cases that provisions similar to Section 411 as it appeared in the Act of August 9, 1921, did not protect the Bureau unless the policy was contested in court within the six months' period after the issuance of the policy even when the insured had died in the meantime. On the other hand, it was found that the United States Circuit Court of Appeals in the case of the *Mutual Reserve Fund Life Association* v. *Austin,* 142 Fed. 398, 6 L. R. A., N. S. 1064, had indicated that insertion of the words

"in continuous force" limited the application of the incontestable clause to the lifetime of the insured, and that the same views have also been indicated by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Insurance Co.,* 283 Ill. 136, L. R. A. 1918 D. 1196.

Thereupon the Bureau requested that Section 411 be amended, and on March 4, 1923, said Section 411 was amended (42 Stat. 1527) and made retroactive to April 6, 1917, and therein it was provided that the policy became incontestable "after the insurance *has been in force* six months from the date of issuance or reinstatement." With the passage of the World War Veterans' Act, 1924, said Section 411 was reenacted as Section 307 (43 Stat. 627) with the same incontestable clause as appeared in Section 411 of the War Risk Insurance Act, as amended by the Act of March 4, 1923, supra.

It is a well recognized rule of statutory construction that where an amendment is enacted it must be presumed that the Legislature intended to make a change in the law as it stood previously and the amendment should be so construed as to give effect to this intention. (Black on Interpretation of Law, Section 165.)

To ascertain the intention of Congress resort may be had to the Reports of the Committee in charge of the legislation. (*Duplex Printing Co.* v. *Emil J. Deering,* 254 U. S. 443.)

The Report of the Committee on Interstate and Foreign Commerce on the Bill which afterwards became the Act of March 4, 1923, contains the following:

> Section 9 of the bill amends Section 411 of the present law so that a policy of insurance shall be incontestable after it has been in force six months, instead of providing that the policy shall be incontestable six months after date of issuance or reinstatement. Section 411 now provides that, subject to Section 29, a policy of insurance heretofore or hereafter issued in accordance with article 4 of the War Risk Insurance Act shall be incontestable after six months from date of issuance or date of reinstatement, except for fraud or nonpayment of premiums. The Bureau has found upon investigation that a large number of cases construing a similar proviso in insurance policies have held that the maturity of the policy did not stop the running of the statute, and that the statute could be stopped from running only by action brought in court to cancel the policy. In other words, if an insured paid one month's premium and no more and died or became permanently disabled within that month the Government would be bound to pay the policy (if the bureau followed these opinions) unless the Government, within six months from the date of issuance of the policy or reinstatement had begun a suit to cancel the policy. *The amendment, instead of provid-*

> *ing that the policy shall be incontestable six months after date, provides that it shall be incontestable after the policy "has been in force six months." All the cases hold that where the provision in the policy is that it must be in force six months that the maturity of the policy stops the running of the statute and the insurer can contest.* (Congressional Record, Vol. 64, Part 5, pages 5195, 5196.)

The intent of Congress expressed in the foregoing Committee Report is clear and certain and it must follow that the phrase "has been in force," as it applies to the policy of insurance issued under the War Risk Insurance Act, or its amendments, *means this and just this: that if death or permanent and total disability of the insured happens within six months from the date of issuance of the policy the incontestable clause is suspended.*

If the plaintiff should urge that similar language in ordinary insurance contracts has been interpreted otherwise by the Courts—as admittedly is the fact—that is something with which we are not and can not here be concerned for *in this case we are not dealing with an ordinary contract of insurance* but one commonly known as a war-risk insurance contract, one which by an unbroken line of decisions is held not controlled by state laws or decisions, and one issued subject to statutes and regulations then existent, or thereafter enacted or promulgated. (*Helmholz et al.* v. *Horst et al.*, 294

Fed. 417; *Sawyer* v. *United States,* 10 Fed. (2d) 416; *White* v. *United States,* 270 U. S. 175.)

Further, the United States Veterans' Bureau, the Department of the Government charged with the administration of war-risk insurance legislation, has from the beginning construed the language "has been in force" in conformity with the clearly expressed intent of Congress as is set out in the foregoing Committee Report.

In an opinion by the General Counsel of the United States Veterans' Bureau rendered June 3, 1924, in the case of Otis L. Sutherland, it was stated: "The precedents of this office have consistently held that the insured must survive the six months' period prescribed by the statute in order for the incontestable clause to operate." (28 Opinions General Counsel 1440.)

> A settled construction by a Department of the Government of the laws of the United States will not be overturned by the courts unless clearly wrong. (*Illinois Surety Co.* v. *United States,* 249 U. S. 214; 60 L. Ed. 609.)

When Congress reenacted Section 307 of the World War Veterans' Act, using the identical language of Section 411 of the War Risk Insurance Act, it knew, or was presumed to know, the construction which had been placed thereon by the Veterans' Bureau; and in reenacting the law without change Congress impliedly recognized and ap-

proved the Veterans' Bureau's construction of the phrase "has been in force" under the rule laid down in the case of United States *v.* Cerecedo Hermanos Y Compania, 209 U. S. 337; 52 L. Ed. 821, which holds that:

> The reenactment by Congress, without change, of a statute which has previously received a long-continued executive construction, is an adoption by Congress of such construction.

Recalling then that as is provided in Section 304 of the World War Veterans' Act, which is quoted in this brief at page 4, it is the Director of the Veterans' Bureau who determines whether or not insurance shall be reinstated; that the defendant in its further and separate answer alleged and then offered to prove that the Director had determined this plaintiff to have become permanently and totally disabled prior to the issuance of this insurance; that the plaintiff admitted that he became permanently and totally disabled within six months from the date of the issuance of the policy and that the Bureau had so rated him; that thereafter the Bureau had notified the plaintiff of its action in cancelling the policy; that the defendant returned the premiums to the plaintiff; and that *this contract provided that the operation of the incontestable clause was suspended if the contingency insured against happened within six months from date of issuance,* it must follow that the Trial Court erred

in sustaining plaintiff's demurrer to the defendant's further and separate answer.

It is respectfully submitted that the judgment of the Trial Court should be reversed.

GEORGE NEUNER,
United States Attorney.
FRANCIS E. MARSH,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
General Counsel.
J. O'C. ROBERTS,
Assistant General Counsel.
JAMES T. BRADY,
Attorney,
United States Veterans' Bureau.

U. S. GOVERNMENT PRINTING OFFICE: 1929

No. 5917

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

HENRY A. JENSEN, Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEE, HENRY A. JENSEN

GEORGE NEUNER,
United States Attorney.

FRANCIS E. MARSH,
Assistant United States Attorney.

WILLIAM WOLFF SMITH, General Counsel.
J. O'C. ROBERTS, Assistant General Counsel.
JAMES T. BRADY, Attorney, United States Veterans' Bureau.

B. A. GREEN, Portland, Oregon,
Attorney for Appellee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5917

UNITED STATES OF AMERICA, Appellant,

v.

HENRY A. JENSEN, Appellee

BRIEF OF APPELLEE, HENRY A. JENSEN

STATEMENT OF THE CASE

The facts in this case are not in dispute. Henry Jensen while with the military forces of the United States was granted a ten thousand dollar war risk term insurance policy. This insurance lapsed for non-payment of the premium for the month of June, 1919. Upon June 2, 1927, plaintiff applied to the United States Veterans Bureau for reinstatement and conversion of this lapsed insurance in the full amount. The World War Veterans Act of June 7, 1924, provided that in the event all provisions other than the requirements as to physical condition of the applicant are made, an application for reinstatement may be approved, provided the applicant's disability, if any, is the result of an injury or disease or an aggravation thereof suffered or contracted in the military or naval service during the World War, provided the applicant during his lifetime submits satisfactory evidence to the director showing the service origin thereof, **and that the applicant is not**

totally and permanently disabled. This provision of the Veterans Act became a part of every reinstated application and policy. It is important to bear this in mind, because the law specifically provides that the applicant during his lifetime must submit satisfactory evidence to the director that he is not permanently and totally disabled at the time of the application. Therefore, we **must assume that this portion of the law was complied with before the acceptance of the application.** In other words, here is a positive and affirmative finding as to this man's condition, to-wit, that he was not permanently and totally disabled upon June 2, 1927, or at least July 1, 1927. The policy was issued to this plaintiff, the premiums were paid thereon to and including the month of January, 1928. This of itself means an acceptance of the premiums for a period of six months which carries the policy beyond the contestable clause. The Regional office of the Veterans Bureau at Portland, Oregon, rated the man on December 8, 1927, permanently and totally disabled as of December 7, 1927. Upon May 5, 1928, the director of the Veterans Bureau reviewed the Regional findings and rated this man permanently and totally disabled as of the 19th day of August, 1927. **The plaintiff below was not advised of this fact until June 14, 1928,** or more than six months after the previous rating of December 8, 1927. On June 14, 1928, the director attempted to cancel the policy.

The appellant or defendant below set forth these facts in the answer. The plaintiff filed a demurrer to this answer, and the same was sustained by order

of the court. The offer of proof made by the appellant and the facts pertaining thereto are clearly set forth in the statement of facts as given by the appellant. Judgment was entered for the plaintiff in the sum of $52.91 from December 7, 1928. This judgment was filed June 17, 1929.

ARGUMENT

The court must bear in mind that before a policy could be reinstated proof must be made to the director that the man **was not permanently and totally disabled. This Jensen did during the month of June, 1927.** No fraud or deceit is or can be alleged or claimed.

The case has a practical common sense viewpoint. The law permitted reinstatement prior to July 1, 1927, upon application and proof that the man was not permanently and totally disabled, and upon payment of certain back premiums. Jensen complied with the law. The act is to be liberally construed in favor of the veterans (Jagodnigg vs. United States, 295 Federal 916. United States vs. Cox, 24 Federal 2nd, 944. United States vs. Eliasson, 20 Federal 2nd, 821). He paid his premiums. He was called for examination in December, 1927. He was examined and a permanent and total disability rating given him by the Portland Regional office. Then more than six months elapse and he is told by the director that his rating of total and permanent disability had been made retroactive to August 19, 1926, and therefore he was not entitled to reinstate his policy.

As a practical matter, all of these boys are solely under the control of the Veterans' Bureau. They

are subject to Government ratings except upon contest upon the insurance contract. Their treatments are received from the Government doctors, and the Government doctors in a case such as this attend a man when sleeping and waking, as he walks, as he talks, and as he eats. His every action is subject to the minutest control. The failure to report for examination or failure to accept treatments is subject to punishment. The law permitted reinstatement. The boys were urged time after time to reinstate. A definite program of propaganda was carried on for months to secure by the Government the very things these boys did. It was a process of salesmanship. This man, without reinstatement, had the opportunity to show a permanent and total disability rating from date of discharge. In the place of filing his contest, as hundreds of others have done, upon his original policy of War Risk Insurance, he followed the advice of the defendant and reinstated, paid his money and secured his contract. The defendant now attempts to destroy this policy. The Government surely blows hot and blows cold. Upon July 1, 1927, it said: "You are not permanently and totally disabled." Upon June 14, 1928, it said: "You were permanently and totally disabled August 19, 1926, and ever since said date has been and always will be." Which is true? Even this great Government must have and maintain some little harmony of action.

THE LAW IN THIS CASE

The cases cited by the appellant on pages 10 and 11 of the brief do not show that War Risk Insurance is of a different nature than other insurance, except that it possesses somewhat more liberal features. These liberal features in favor of the men do not extend to the right of the Government to carry on in the manner in which they carried on in the Jensen case. The difference between this Government insurance and the old line insurance comes from the fact that Government insurance is presumed to be without profit. This element of profit, or the carrying charge, being absorbed by the people of this nation in recognition of the service rendered by these men. Otherwise, its features are the same. Jensen could not by virtue of his reinstatement sue upon his original policy of War Risk Insurance (Allen vs. the United States, 33 Fed. (2nd) 888). If the Government is right he now cannot sue upon this reinstatement policy, because they contend he never had such a policy. In other words, the Government, by blowing hot and cold, caused him to reinstate so that he could not sue on his policy of War Risk Insurance, and, second, carried him as to his War Risk Insurance beyond the statute of limitations, and, third, after the happening of these two contingencies, cancelled his reinstated policy and thereafter he is denied relief from any and every angle. Law is presumed to be the rule of reason. Reason does not appear herein.

Appellant lays great stress upon the words "has been in force" and the meaning of these words. This policy was in force until the notice of contest—that

is, the letter of June 14, 1928. True, the policy matured upon the rating of permanent and total disability of December 7, 1927, but the man paid his premium even for the month of January, 1928. The maturity of the policy did not void the policy, and the element of contest did not enter into this case until long subsequent to the six months period provided in the contract. We are unable to follow the appellant's reasoning and cannot but conclude that the policy remained in full force and effect without the element of contest being present until June 14, 1928. **Every affirmative act appearing in this record was the act of the Government.**

Appellant lays great stress upon the fact that Congress by the amendment of an act must have had in mind the rulings of the department which administered this law. It is also a rule of law too well settled for argument that Congress in the amendment of any law is presumed to have in mind the rulings of the United States Supreme Court with respect to the law and the questions involved. The rulings of the Supreme Court are of more force and effect and are paramount to the settled policies of the administrative head of any department of the Government.

The issues are clearly drawn. Either the statement of Honorable Robert S. Bean, district judge in the same case, Jensen vs. the United States, 29 Federal 2d, 951, is correct or it is not correct. There can be no middle ground. We feel that it would be futile for us to attempt to improve upon the statement given in this case. We quote a portion of this opinion:

"The position of the Government is that the permanent and total disability of the plaintiff within the six months' period matured the policy and it was not thereafter "in force," and therefore the incontestable provisions of the law had no application, and such seems to be the ruling of the Comptroller General in Philip McNish (7 Decisions Comptroller 551). But I am unable to distinguish this case from Mutual Life Ins. Co. v. Packing Co., 263 U. S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102, and Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A.) 294 F. 886, holding that the death of an insured does not stop the running of the incontestable provision of a life policy, for the reason that it does not terminate the contract of insurance, which upon the death of the insured immediately inures to the benefit of the beneficiary.

"So here the fact that the insured became totally and permanently disabled within the six months' period did not terminate the insurance. The insurance was payable in 240 equal monthly payments. Section 512, 38 U. S. C. A. The permanent and total disability of the insured merely fixes the date when the monthly payments should commence. The contract itself continues in force until the plaintiff has received the full benefit thereof unless his disability ceases in the meantime. If the government should refuse at any time to make such payments and the plaintiff elects to bring action to recover the same, he would necessarily be compelled to rely on the contract of insurance as a basis for his action. It is suggested that since war risk insurance differs from commercial life insurance, in that it is an insurance against both death and total disability, and may be reinstated at a time when the insured is suffering from service con-

nected temporary total disability, the rule applicable to commercial insurance is not controlling, in the constructions of section 307 of the World Veterans' Act. But war risk insurance is not a gratuity but a contract between the insured and the government, and the rights of the parties are to be ascertained from the terms of their contract. St. Bank & Trust Co. v. U. S. (C. C. A.) 16 F. (2d) 439. The provisions of section 307 are, I take it, to be construed and determined by the applicable rules to similar provisions in any other contract of insurance."

We submit the judgment should be sustained.

B. A. GREEN,
Attorney for Appellee.

No. 5918

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE SHALLAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index. Page

In the District Court of the United States in and for the District of Idaho, Northern Division.

No. 2923.

Charge: Violation Section 125 Federal Penal Code.

UNITED STATES OF AMERICA,

vs.

GEORGE SHAWLE, *Alias* GEORGE SHALLAS,
Whose True Name is GEORGE SHALLAS,
Defendant.

INDICTMENT.

The Grand Jurors of the United States of America, being first duly empaneled and sworn, within and for the District of Idaho, Northern Division, in the name and by the authority of the United States of America, upon their oath do find and present:

That heretofore, to wit, on or about the 28th day of November, A. D. 1928, in the District Court for the District of Idaho, Northern Division, before Honorable Charles C. Cavanah, Judge of the aforesaid court, there was then and there pending and on trial, in the city of Coeur d'Alene, county of Kootenai, State and District of Idaho, Northern Division, and within the jurisdiction of this court, a certain criminal proceeding wherein the United States of America was plaintiff and Theodore Seivers, defendant, being case No. 2828, and wherein Theodore Seivers was duly and legally charged in two counts with certain violations of

the National Prohibition Act, in the words of said information as follows, to wit:

COUNT ONE.

(Possession.)

That Theodore Seivers, late of the County of Benewah, State of Idaho, heretofore, to wit, on or about the 14th day of October, 1928, at Tensed, Idaho, in the said county of Benewah, in the Northern Division of the District of Idaho, and within the jurisdiction of this court, did then and there, wilfully, knowingly and unlawfully have in his possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to wit, one pint of certain spirituous liquor commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful, and contrary to the form of the statute in such case made [1*] and provided and against the peace and dignity of the United States of America.

COUNT TWO.

(Sale.)

That Theodore Seivers, late of the county of Benewah, State of Idaho, heretofore, to wit, on or about the 14th day of October, 1928, at Tensed, Idaho, in the said county of Benewah, in the Northern Division of the District of

*Page-number appearing at the foot of page of original certified Transcript of Record.

> Idaho, and within the jurisdiction of this court, did, then and there, wilfully, knowingly and unlawfully sell a quantity of certain intoxicating liquor containing more than one-half of one per cent of alcohol, to wit, one pint of certain spirituous liquor commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, the sale of same being then and there prohibited and unlawful, and contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

and of which said judicial proceeding, the said court then and there had jurisdiction to try said issues according to the laws of the United States of America, and which said court then and there being and having been fully competent to administer the law in said trial; that it then and there became and was material to know in said proceeding whether or not Theodore Seivers, the defendant, was in Tensed, Idaho, on the afternoon and evening of October 14, 1928, and one GEORGE SHAWLE, *alias* GEORGE SHALLAS, was then and there duly called as a witness in said trial for and on behalf of the said defendant Theodore Seivers, whereupon W. D. McReynolds, the duly appointed, qualified and acting Clerk of said court and an officer authorized by law and competent to administer oaths, and to administer an oath to the said GEORGE SHAWLE, *alias* GEORGE SHALLAS as a witness in said cause, did, then and there,

on the said 28th day of November, 1928, in the city of Coeur d'Alene, county of Kootenai, State and District of Idaho, Northern Division, administer an oath in due form of law to the said GEORGE SHAWLE, *alias* GEORGE SHALLAS, and the said GEORGE SHAWLE, *alias* GEORGE SHALLAS, being so sworn to tell the truth, the whole truth and nothing but the truth, he, the said GEORGE SHAWLE, *alias* GEORGE SHALLAS, did, then and there, to wit, on the 28th day of November, 1928, in the trial entitled the United States of America vs. Theodore Seivers, defendant, as aforesaid, wilfully, knowingly and unlawfully, corruptly, falsely and feloniously swear, take oath, say and give evidence, among [2] other things, and give the answers as hereinafter set forth, in response to the questions hereinafter set forth, to wit:

Q. Where do you reside? A. Spokane.

Q. What is your business?

A. Hotel business.

Q. What hotel are you operating?

A. The Ethlyn Hotel.

Q. Were you operating the Ethlyn Hotel during the month of October, 1928? A. Yes.

Q. Were you at the hotel on the 13th, 14th and 15th days of October, 1928? A. I was.

Q. Did you see Mr. and Mrs. Sievers there at your hotel on the thirteenth? A. I did.

Q. Did you see them there on the 14th?

A. I did.

Q. And what part of the day do you recall seeing them on Sunday, the 14th?

A. About nine—between nine and ten o'clock they went out, and Mr. Seivers told me—

Q. That would be hearsay?

A. I seen them in the morning.

Q. And again in the afternoon? A. Yes.

Q. How many times do you recall—approximately how many times do you recall?

A. A couple of times in the afternoon.

Q. Did they stay at the hotel Sunday night?

A. They did.

Q. Do you remember their checking out there Monday? A. The fifteenth, yes. [3]

Q. Who, if anybody, did the checking out—who did they pay there? A. Personally to me.

Q. Mr. Sievers did? A. Yes.

Q. Calling your attention to October 14th, you say you saw the defendant Theodore Sievers at your hotel? A. Yes.

Q. About what time did you first see him there on that day?

A. I seen him in the morning once, around nine-thirty or ten.

Q. When did you next see him?

A. In the afternoon.

Q. What time?

A. A couple of times between three and five.

Q. You saw him twice between three and five?

A. Yes.

WHEREAS, in truth and in fact, as he, the said GEORGE SHAWLE, *alias* GEORGE SHALLAS,

then and there will knew, the said THEODORE SEIVERS was not at the Ethlyn Hotel in the city of Spokane, State of Washington during the afternoon and evening of October 14, 1928, during the time or times that the said GEORGE SHAWLE, *alias* GEORGE SHALLAS testified that the said Theodore Seivers was there, or at any other time on that day and that the said GEORGE SHAWLE, *alias* GEORGE SHALLAS, did not see the said Theodore Seivers during the afternoon of October 14, 1928, in the Ethlyn Hotel or any other place in the city of Spokane, State of Washington, whereby he, the said GEORGE SHAWLE, *alias* GEORGE SHALLAS did, then and there, as aforesaid, knowingly, wilfully, unlawfully, corruptly, falsely and feloniously swear and did feloniously commit perjury. [4]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

H. E. RAY,

United States Attorney for the District of Idaho.

CARL LUNDGREN,

Foreman of the United States Grand Jury.

Witnesses Examined Before the Grand Jury in the Above Case:

W. H. Phillips.
Dene Hickman.
Leo Hamilton.
W. D. McReynolds.
Susan Lawrence.
Timothy Dominick.
R. J. Hart.
Roy Shaw.
W. H. McNeil.

Presented by the foreman in open court and

filed in the presence of the Grand Jury May 29, 1929.

W. D. McREYNOLDS,
Clerk. [5]

[Endorsed]: Indictment. Charge: Vio. Sec. 125, Fed. Penal Code—Perjury. U. S. Rev. St., §——.

H. E. RAY,
U. S. Attorney.

A true bill.

CARL LUNDGREN,
Foreman.

Presented by the foreman in open court and filed in the presence of the Grand Jury May 29, 1929.

W. D. McREYNOLDS,
Clerk. [6]

[Title of Court and Cause.]

MOTION FOR ORDER EXTENDING TIME TO AUGUST 12, 1929, TO FILE BILL OF EXCEPTIONS.

Comes now the defendant in the above-entitled action and petitions the Court for an order extending the time within which to serve and file bill of exceptions in the above-entitled matter until August 12th, 1929.

This motion is based on records and files herein and to affidavit of Alan G. Paine hereto attached.

ROBERTSON & PAINE,
Attorneys for Defendant. [7]

[Title of Court and Cause.]

AFFIDAVIT OF ALAN G. PAINE.

State of Washington,
County of Spokane,—ss.

Alan G. Paine being first duly sworn upon his oath deposes and says that he is the attorney for George Shallas and that on receipt of the memorandum opinion of the Honorable Judge C. C. Cavanah the above-entitled case holding that the petition for a new trial should be denied, that he prepared an order denying petition for a new trial and mailed the same to W. D. McReynolds, Clerk of the United States District Court at Boise, Idaho, with a letter requesting him to have the order signed and entered and advise him of the date of signing; and that on July 19th you received from said *Clerk District* Court a letter returning his order and stating that the order had already been signed and entered on July 11th.

This was the first notification he had of the date when the order denying the new trial was signed. He, at once, communicated with Mr. L. G. Hamilton and told him to commence getting out the bill of exceptions, and it was physically impossible to prepare and serve a bill of exceptions within the time allowed by the Rules of the Court after he received notice of the date of the order denying the motion for a new trial and that if the time is extended to August 12th, 1929, the bill of exceptions can be prepared and filed herein, and

the case docketed at the first term of the Circuit Court to be held after the judgment herein. [8]

ALAN G. PAINE.

Subscribed and sworn to before me this 26th day of July, 1929.

[Seal] E. W. ROBERTSON,
Notary Public.

[Endorsed]: Filed July 27, 1929. [9]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 12, 1929, TO FILE BILL OF EXCEPTIONS.

The above-entitled matter having come up for hearing on defendant's application for an order extending the time in which to serve and file bill of exceptions in the above-entitled case the Court being advised in the premises

IT IS ORDERED that the defendant have to and including the 12th day of August, 1929, in which to serve, file and settle his bill of exceptions in the above-entitled case.

Done in Chambers in Boise, Idaho, this 27th day of July.

CHARLES C. CAVANAH,
United States District Judge.

[Endorsed]: Filed July 27, 1929. [10]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the defendant and petitions the Court to vacate and set aside the verdict of the jury herein and to grant the defendant a new trial upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict of the jury.

II.

Error in law occurring at the trial and excepted to at the time by the defendant.

III.

That the evidence was insufficient in that it did not show that the defendant did not see the witness Theodore Seivers in Spokane, Washington, on October 14, 1928, and that there was no evidence corroborating the testimony of the witness Theodore Seivers that the defendant George Shallas did not see said witness in Spokane, Washington, during the afternoon of October 14, 1928, or at any time on that date.

That the errors of law occurring at the trial were as follows:

That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of the Government's case.

That the Court erred in refusing to grant the

defendant's motion for a directed verdict made at the close of all testimony.

That the Court erred in refusing to give defendant's requested instruction No. 2. [11]

That the Court erred in instructing the jury that if they found that the statements of the defendant made at the trial of Theodore Seivers, in November, 1928, that he saw said Theodore Seivers at the Ethlyn Hotel in Spokane, Washington, between 3:00 and 5:00 o'clock on October 14, 1928, were false and knowingly and wilfully made, they can find defendant guilty.

The Court erred in instructing the jury that the indictment charged that the defendant George Shallas wilfully, unlawfully, corruptly, falsely and feloniously swore that Theodore Seivers stayed at the Ethlyn Hotel Sunday night, October 14, 1928.

ROBERTSON & PAINE,
Attorneys for Defendant.

[Endorsed]: Filed June 5, 1929. [12]

[Title of Court and Cause.]

AMENDED PETITION FOR NEW TRIAL.

Comes now the defendant and petitions the Court to vacate and set aside the verdict of the jury herein and to grant the defendant a new trial upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict of the jury.

II.

Error in law occurring at the trial and excepted to at the time by the defendant.

III.

That there is newly discovered evidence material for the defendant which could not with reasonable diligence have been discovered and produced at the trial.

IV.

That the evidence was insufficient in that it did not show that the defendant did not see the witness Theodore Sievers in Spokane, Washington, on October 14, 1928, and that there was no evidence corroborating the testimony of the witness Theodore Sievers that the defendant George Shallas did not see said witness in Spokane, Washington, during the afternoon of October 14, 1928, or at any time on that date.

That the errors of law occurring at the trial were as follows: [13]

That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of the Government's case.

That the Court erred in refusing to grant the defendant's motion for a directed verdict made at the close of all testimony.

That the Court erred in refusing to give defendant's requested instruction No. 2.

That the Court erred in instructing the jury that if they found that the statements of the defendant made at the trial of Theodore Sievers, in

November, 1928, that he saw said Theodore Sievers at the Ethlyn Hotel in Spokane, Washington, between 3:00 and 5:00 o'clock on October 14, 1928, were false and knowingly and wilfully made, they can find defendant guilty.

The Court erred in instructing the jury that the indictment charged that the defendant George Shallas wilfully, unlawfully, corruptly, falsely and feloniously swore that Theodore Sievers stayed at the Ethlyn Hotel Sunday night, October 14, 1928.

V.

Newly discovered evidence as contained in the affidavits of Laura Sievers and Alan G. Paine attached hereto and made a part hereof.

ROBERTSON & PAINE,
Attorneys for Defendant. [14]

[Title of Court and Cause.]

AFFIDAVIT OF LAURA SIEVERS.

State of Washington,
County of Spokane,—ss.

Laura Sievers, being first duly sworn, upon her oath deposes and says: that she is the wife of Theodore Sievers who testified for the Government in the above-entitled case in the United States District Court for the District of Idaho, at Coeur d'Alene, Idaho, on June 4, 1929; that she had been in Coeur d'Alene, Idaho, on the 27th day of May, 1929, and at that time she was informed by the District At-

torney's office that she was not needed in Coeur d'Alene, and that she should go back to her home in Tensed and stay there; that on June 4th, 1929, she was called on the long distance telephone by Mr. W. R. Langroise, Assistant United States District Attorney, and told that she was wanted at Coeur d'Alene to testify in the case of United States vs. George Shallas, and that she was to come at once to Coeur d'Alene; that she secured a car driven by Dave Cohn of Tekoa, Washington, and that said Dave Cohn drove her to Coeur d'Alene, and that she was there met by Mr. Dave Hickman, Special Agent of the Department of Justice, and taken into the office of the United States Marshal; that there she was questioned by Mr. Hart and Mr. Hickman, and asked by them to testify in the case of the United States vs. George Shallas, to the effect that on the 14th day of October, 1928, she and her husband, Ted Sievers, [15] after leaving the Ethlyn Hotel, Spokane, Washington, about 9:00 or 9:30 in the morning, never returned to the Ethlyn Hotel on that date; that she informed said Hickman and said Hart that that was not true, that she and her husband, Ted Sievers, did return to the Ethlyn Hotel, Spokane, Washington, after lunch, and some time between 2:00 and 3:00 P. M., that her husband, Ted Sievers, got out of their car and went into the Ethlyn Hotel to get a pair of her shoes and some toilet articles which she had left there; she told said officers that she was positive that this had occurred, and that she would so testify if called upon the witness-stand; that thereupon the said Hickman turned her over to the cus-

tody of the United States Marshal, Mr. Brashers, and that she was detained in the United States Marshal's office and not permitted to leave the same; that when she attempted to leave said office during the recess of said court, Mr. Hickman took her by the arm and told her that she had to stay in the Marshal's office; that about 3:30 or 4:00 o'clock, the said Hickman came and took her down to the street where the automobile and the driver who had brought her from Tekoa was parked; that he put her in said automobile and told the driver to take her back home just as fast as he had brought her to Coeur d'Alene, and that she was driven back to Tensed, Idaho; that at no time during the day of June 4th, 1929, did she see or speak to George Shallas, or Alan G. Paine, his attorney; that if a new trial is granted George Shallas, affiant will testify that she was in Spokane on October 14th, 1928, with her husband, Theodore Sievers, and that they did return to the Ethlyn Hotel in the city of Spokane, Washington, on said date, and that said Theodore Sievers went into the said Ethlyn Hotel some time between 2:00 [16] and 3:00 o'clock on said date; and that said facts are true.

LAURA SIEVERS.

Sworn to and subscribed before me this 21st day of June, 1929.

[Seal] E. J. BARKER,
Notary Public for the State of Washington, Residing at Spokane. [17]

State of Washington,
County of Spokane,—ss.

Alan G. Paine, being first duly sworn, upon his oath deposes and says: that he is the attorney for George Shallas and was such attorney at the time of the trial of the above-entitled case; that he had no knowledge or information that said Laura Sievers was in Coeur d'Alene at the date of the said trial; that if he had known that she was present at Coeur d'Alene he would have called her to testify in behalf of the said defendant that she and her husband, Theodore Sievers, returned to the Ethlyn Hotel some time during the afternoon of October 14, 1928; that said Laura Sievers had informed him that she and her husband returned to the Ethlyn Hotel after lunch on October 14th, and that he believed said Theodore Sievers would admit that they had done so; that he did not subpoena said Laura Sievers to be present at the trial of the above-entitled action for the reason that she had informed him several days before that there were pending against her charges of perjury and that she understood that the charges would be dropped if she returned to Tensed and remained there, and that he did not feel justified in compelling her to attend as a witness under the circumstances; that her testimony is vitally material to the defendant and that if a new trial is granted the testimony given will undoubtedly result in a different verdict.

ALAN C. PAINE.

Sworn to and subscribed before me this 26th day of June, 1929.

EDWARD W. ROBERTSON,
Notary Public for the State of Washington, Residing at Spokane.

[Endorsed]: Filed June 28, 1929. [18]

[Title of Court and Cause.]

ORDER DENYING PETITION FOR NEW TRIAL.

Upon consideration, and in harmony with memorandum opinion this day filed in the above-entitled cause,

IT IS ORDERED, that the petition for new trial be and the same is hereby denied. To which defendant excepts, and exception is allowed.

Dated: Boise, Idaho, July 11th, 1929.

CHARLES C. CAVANAH,
District Judge.

[Endorsed]: Filed July 1, 1929. [19]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled case, find the defendant George Shalls guilty as charged in the indictment.

FULTON COOK,
Foreman.

[Endorsed]: Filed June 4, 1929. [20]

CRIMINAL—No. 2923.

June 5, 1929.

UNITED STATES OF AMERICA,

vs.

GEORGE SHALLAS,

Defendant.

JUDGMENT AND SENTENCE.

Comes now the District Attorney with the defendant George Shallas and his counsel into court, this being the time fixed for judgment herein.

The defendant was asked by the Court if he had any legal cause to show why judgment should not be pronounced, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court,

NOW, THEREFORE, IT IS ADJUDGED upon the verdict of the jury that the defendant George Shallas is guilty as charged in the indictment, and

It is further adjudged that said defendant pay a fine of $1,000.00 and be confined in the United States Penitentiary at McNeil Island, Washington, for a term of eighteen months; in default of payment of fine the defendant to be confined in the prison aforesaid until said fine is paid or until the defendant is released by due process of law; confinement on account of fine to run consecutive to the term of imprisonment imposed.

The defendant was remanded to the custody of the United States Marshal to be by him delivered into the custody of the proper officer of said prison.

The defendant's petition for a new trial was argued before the Court by counsel for the respective parties and the defendants were each granted fifteen days for the filing of briefs in final submission of the motion. [21]

[Title of Court and Cause.]

OBJECTIONS OF PLAINTIFF TO THE SETTLING AND ALLOWING OF DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

Comes now the United States of America, and makes the following objections and proposes the following amendments to the proposed bill of exceptions on behalf of the defendant.

1. The United States of America objects to the settling and allowing of the proposed bill of exceptions of the defendant for the reason and upon the

ground that the court has no jurisdiction to allow said bill of exceptions; that the said proposed bill of exceptions was not filed and lodged with the Clerk within the time prescribed or allowed by Rule 76 of the Rules of Practice of the United States District Court for the District of Idaho, in the following respects:

(a) That the said case was tried on June 4, 1929, at Coeur d'Alene, Idaho, during the May term of that court, and there was not at any time during the trial of said cause, or within ten days after the rendition of the verdict of said case, any order secured from the Court allowing the preparing and filing of any exceptions in the case.

(b) That the first order or purported order secured from the Court with respect to preparing and filing of bill of exceptions in this matter was secured on the 27th day of July, 1929, [22] said purported order being dated and made at Boise, Idaho, long after the May term of court at Coeur d'Alene adjourned without day.

This objection is based upon all the records and files in the above-entitled case and upon the minute-book of the Clerk of the United States District Court for the District of Idaho, showing the adjournment of said May term of court.

The above objection is denied and exception allowed.

CHARLES C. CAVANAH,
Judge.

* * * * * * * * *

[23]

(Testimony of W. D. McReynolds.)

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above and foregoing cause came regularly on for hearing in the above-entitled court before the Honorable Charles C. Cavanah, Judge thereof, with the jury at Coeur d'Alene, Idaho, on Tuesday, June 4th, 1929, at 9:30 A. M.; William H. Langroise, Assistant United States District Attorney, appearing for the plaintiff, and Alan G. Paine, appearing for the defendant.

The jury was then impaneled and sworn, after which the following proceedings were had:

TESTIMONY OF W. D. McREYNOLDS, FOR PLAINTIFF.

W. D. McREYNOLDS was called and sworn as a witness in behalf of the plaintiff and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I am now, and was on November 28th, 1928, the duly qualified and acting clerk of this court. There was pending, and on trial on November 28th, 1928, at Coeur d'Alene, Idaho, an action entitled United States vs. Theodore Sievers. (Information in the case of U. S. vs. Theodore Sievers, No. 2828 marked Plaintiff's Exhibit No. 1, admitted in evidence.)

(Testimony of W. D. McReynolds.)

The defendant, George Shallas, was called as a witness for the defendant in the trial of the case of U. S. vs. Sievers on November 28th, 1928, in the Northern Division of the District of [24] Idaho, at Coeur d'Alene, Idaho, before his Honor, Judge Cavanah, I administered the oath in the form prescribed by law to him, and he swore to it.

TESTIMONY OF LEO G. HAMILTON, FOR PLAINTIFF.

LEO G. HAMILTON was called and sworn as a witness on behalf of the plaintiff, and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I am now, and was on November 28th, 1928, Court Reporter for the United States District Court for the District of Idaho. I took down in shorthand, the testimony of George Shallas in Case No. 2828, entitled United States vs. Theodore Sievers, on November 28th, 1928. I, thereafter, transcribed my notes. The witness, George Shallas, at Coeur d'Alene, Idaho, in the Northern Division of the District of Idaho, in the case of the United States of America vs. Theodore Sievers, on November 28th, 1928, did testify and make the following answers to the following questions, upon direct examination by Mr. Wernette: "Q. Where do you reside? A. Spokane. Q. What is your business? A. Hotel

(Testimony of Leo G. Hamilton.)

business. Q. What hotel are you operating? A. Ethlyn Hotel. Q. Were you operating the Ethlyn Hotel during the month of October, 1928? A. Yes. Q. Were you at the hotel on the 13th, 14th and 15th days of October, 1928? A. I was. Q. Did you see Mr. and Mrs. Sievers there at your hotel on the 13th? A. I did." "Q. Did you see them there on the 14th? A. I did. Q. And what part of the day do you recall seeing them on Sunday, the 14th? A. About nine — between nine and ten o'clock they went out, and Mr. Sievers told me—Q. That would be hearsay. A. I seen them in the morning. Q. Again in the afternoon? A. Yes. Q. How many times do you recall—approximately how many times do you recall? A. A couple of times in the afternoon. Q. Did they stay at the hotel Sunday night? A. They did. Q. Do you remember their checking out there Monday? The 15th, yes. [25] Q. Who, if anybody, did the checking out—who did they pay there? A. Certainly to me. Q. Mr. Sievers did? A. Yes."; and on cross-examination by Mr. Langroise, testified as follows: "Calling your attention to October 14th, you say you saw the defendant, Theodore Sievers at your hotel? A. Yes. Q. About what time did you first see him there on that day? A. I seen him in the morning once, around nine thirty or ten. Q. When did you next see him? A. In the afternoon. Q. What time? A. A couple of times between three and five. Q. You saw him twice between three and five? A. Yes."

TESTIMONY OF THEODORE SIEVERS, FOR PLAINTIFF.

THEODORE SIEVERS was called and sworn as a witness on behalf of the plaintiff, and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I am the Theodore Sievers, who was charged in two counts with a violation of the National Prohibition Law, Case Number 2828, tried in Coeur d'Alene, November 28th, 1928. I entered a plea of guilty to those two charges here at this term. I am the same Theodore Sievers indicted by the Grand Jury in Case No. 2917 for perjury in connection with my testimony at that time. I have entered a plea of guilty to that charge. I know the defendant, George Shallas. I met him about a year ago. I was arrested in the latter part of October, 1928, in connection with the possession and sale of intoxicating liquor. About a week after the preliminary hearing at Plummer, I had occasion to see and talk to the defendant at Spokane. I went up to the Ethlyn Hotel, where he was, and explained the case to him. I said I was arrested for the sale of liquor and that I had been up to Wernette's and he told me to go and see if I could get another witness to testify that I wasn't home on Sunday, October 14th, 1928. I told George Shallas just how I sold the whiskey that night and

(Testimony of Theodore Sievers.)

that I didn't think nobody seen me, [26] so then he says, "Are you sure nobody saw you?" and I said, "I'm pretty sure of that." He said, "Well, what do you want to do?" I says, "I want to show the Court that I wasn't home on that certain day." Of course, I had been in Spokane, the Saturday night before, Oct. 13th, so he said, "We will fix up the register to show that you were here on the 13th and 14th, and didn't check out until the 15th." He went into a room and got a pencil and erased the "14" somebody else had registered for room 36, the room my wife and I had on Oct. 13, on the 14th so he just erased the "4" and made a "5," so that proved we were there on the 14th. Plaintiff's Exhibit No. 3 is the registry sheet I refer to, my wife is registered on it. It is the registry sheet he changed at the time I seen him in Spokane. It is in substantially the same condition as it was at that time with the exception of the change that has been made in it; and it is the same one that was offered in the case of United States vs. Theodore Sievers, November 28th, 1928, as Defendant's Exhibit No. 2.

TESTIMONY OF W. D. McREYNOLDS, FOR PLAINTIFF (RECALLED).

At this point, W. D. McREYNOLDS was recalled and testified, Plaintiff's Exhibit No. 3 is the exhibit offered as Defendant's Exhibit No. 2 in the case of the United States vs. Theodore Sievers. The Defendant, George Shallas, was a witness in

(Testimony of W. D. McReynolds.)

that case and identified it as the original record of his hotel. I had it in my custody until a day or two ago and gave it then to the District Attorney. It was kept in the files of the court. I could not testify whether it is in the same condition now as then. I cannot be positive but I do not think any reference was made in the trial in November that Room 36 was registered for by another person on the 15th.

TESTIMONY OF WILLIAM LANGROISE, FOR PLAINTIFF.

WILLIAM LANGROISE was called and sworn as a witness in behalf of the plaintiff and testified as follows:

Direct Examination.

(By Mr. GRIFFIN.) [27]

I am Assistant United States District Attorney for the District of Idaho, and was at the November, 1928, Term. I got Plaintiff's Exhibit No. 3 from Mr. McReynolds and it has been in my possession at all times since, and it is in the same condition as when I got it from Mr. McReynolds.

Mr. LANGROISE.—We renew the offer.

The COURT.—It may be admitted.

Mr. PAINE.—I object on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, or to prove that the defendant here is guilty of perjury in regard to the presence

(Testimony of Theodore Sievers.)

of Mr. Sievers in Spokane, Washington, on the 14th.

The COURT.—Overruled. Under the testimony I think a proper foundation has been laid now.

Mr. PAINE.—Exception.

TESTIMONY OF THEODORE SIEVERS, FOR PLAINTIFF (RECALLED).

THEODORE SIEVERS having resumed the stand continued,—The registration shown on Plaintiff's Exhibit No. 3 made by Mrs. Sievers for Room 36, is the room we occupied on October 13th. The entry which was changed is A. A. J. Logie, Seattle, Room 36, 10:15. The "4" was erased and a "5" made over it. After the erasure, George Shallas put a little dirt on it so it wouldn't be noticed. George Shallas also gave me a little piece of paper showing where I had given him Three and One Half Dollars (3.50) for the room rent for the 13th and 14th.

Mr. PAINE.—We object. The receipt would be the best evidence.

The COURT.—Sustained.

I gave the receipt to Mr. Wernette, I have not seen it since. My wife and I did not stay at the Ethlyn Hotel on the night of Sunday, October 14th, 1928. I did not see George Shallas, this defendant, at any time during the day of October 14th, 1928. I was in Spokane on the afternoon and night of [28] Saturday, October 13th. My wife was with

(Testimony of Theodore Sievers.)

me and we stayed at the Ethlyn Hotel, Sunday the 14th. I got up, I should judge between seven and eight. I went down before that—I sent to my sister's to get my car while my wife was getting dressed, and then I went up and got her grip and went down and went over to St. Luke's Hospital, and got my sister-in-law, Ruby Ohler, and drove around town for a while, and then went down to the Christian Science Church, which let out around about twelve o'clock, or a little after twelve, and then why, after that, we parked down town a little while, and ate our dinner, the three of us. Then we dropped Ruby off at her home. I did not see or talk to George Shallas at any time on Oct. 14th.

Q. Did you see him on the morning of October 15th? A. I did not.

Q. Did you pay him—

Mr. PAINE.—The 15th is not an issue in this case. He is confined here to testimony in regard to the 14th of October. I object on the ground that it isn't proper under the indictment.

The COURT.—It wouldn't be material under the charge.

Mr. PAINE.—No.

The COURT.—The charge is laid on the 14th. It is a question here whether or not what happened after the 14th would be material to any issue in this case.

Mr. PAINE.—That isn't charged in this indictment that it was false.

The COURT.—The charge is on the 14th.

Mr. PAINE.—That is all. He is confined to that.

Mr. LANGROISE.—This other evidence I thought it would be admissible as going to show that he did not see him at any time during that time.

The COURT.—The charge is that he didn't see him at any time on that date—the 14th.

Mr. LANGROISE.—That is true.

The COURT.—I think the objection is well taken. [29]

Mr. LANGROISE.—Very well.

The COURT.—As to what occurred after the 14th would not be material here.

I was in Tensed during the late afternoon and evening of Oct. 14th, 1928. My wife Laura Sievers and I remained at Tensed that night. I sold a pint of moonshine to Susanne Lawrence during the early part of that evening as charged in the information in Case No. 2828. I arrived at Tensed on Oct. 14th after I left Spokane between four-thirty and five-thirty, the best I can remember, and was there all the rest of that day and night until the next morning. I left Spokane around one o'clock, I should judge.

TESTIMONY OF N. D. WERNETTE, FOR PLAINTIFF.

N. D. WERNETTE was called and sworn as a witness on behalf of the plaintiff and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I am an attorney of Coeur d'Alene, and represented Theodore Sievers in Case No. 2828. Either Mr. or Mrs. Sievers gave me a piece of paper purporting to be a receipt from the Ethlyn Hotel signed Geo. Shallas some time prior to the trial of Case No. 2828 and shortly after Sievers was arrested. I am unable now to locate it. It was never introduced in evidence at the trial of U. S. vs. Sievers.

TESTIMONY OF THEODORE SIEVERS, FOR PLAINTIFF (RECALLED.)

THEODORE SIEVERS being recalled testified as follows: I never got the receipt back from Mr. Wernette, it was just a receipt to show that I had checked out on the 15th and the amount paid.

Mr. PAINE.—I object to that as incompetent, irrelevant and immaterial under the indictment.

The COURT.—Did this paper receipt cover any time you were at the hotel before the 15th?

A. Yes, it was supposed to have been for the 13th and 14th.

(Testimony of Theodore Sievers.)

The COURT.—Do you wish to cross-examine him before I [30] rule?

Mr. PAINE.—No.

The COURT.—Overruled.

Mr. PAINE.—Exception.

It was given to me by George Shallas several days before the trial and some time after the 15th of October. I did not pay the defendant at the Ethlyn Hotel the amount shown on the receipt.

Cross-examination.

(By Mr. PAINE.)

I am twenty-six years old, my wife's name is Laura Sievers. I have not yet been sentenced on the charges of selling liquor and perjury to which I plead guilty.

Q. Your wife and mother-in-law were bound over for perjury committed in this same transaction last fall?

Mr. LANGROISE.—That isn't true.

Mr. PAINE.—They were bound over on a charge placed against them before the United States Commissioner and released on $500 bonds?

Mr. LANGROISE.—That is not material and is not a fact. The record would be the best evidence.

The COURT.—Yes, unless he knows.

Mr. PAINE.—It is a question of whether or not he knows.

A. When?

Q. Last January some time.

(Testimony of Theodore Sievers.)

A. They went over there for something. I suppose that is what they went over there for. That is what I thought.

Q. You thought that up until this term of court?

A. Yes.

Q. Isn't it a fact, Mr. Sievers, that your information was that if they would leave town and go back to Tensed that you would plead guilty to the liquor and perjury charges and charges would not be filed against your wife and mother-in-law? A. No.

Q. What is it?

A. I never had no understanding with nobody. [31]

Q. But wasn't that the impression you had—isn't that the belief you had?

A. Yes. I don't know whether they went back to Tensed *of* not.

I was arrested on the liquor charge on the 21st or 22d of October, about a week or eight days afterwards. I went to see George Shallas about a week after this 21st of Oct., and about two weeks after the offense was committed. I saw Mr. Wernette in his office prior to that time, he stated that if I could get somebody that would be the best way to prove that I wasn't at home on that day. He told me to go out and prove that I wasn't at home on the 14th of October. At the preliminary hearing; I asked him what he was going to do, and he didn't know yet until after the preliminary. After the preliminary he asked me where we had stayed. I told

(Testimony of Theodore Sievers.)

him I was at Spokane on the 14th, and that I never come home until late on the 14th, and then, why, he says, "Do you think anybody saw you?" I said, "'Nobody that I know of." He said, "That would be your best defence." To prove that I weren't home on that certain day. Then I went up to Spokane and seen George Shallas and explained the case to him and he said, "Well, I suppose we can fix it up some way." It is not a fact that I told him that I was there on Saturday and Sunday, the 13th and 14th and asked him to come and testify to that. I didn't see him on the 14th, maybe he seen me. I was not at the hotel when I went back from lunch before I went to Tensed. I dropped my sister-in-law off down the street and to the best of my knowledge I didn't stop at the Ethlyn Hotel. I was in the Ethlyn Hotel in the morning of Oct. 14th and I told Shallas that and wanted him to go on the witness-stand and testify to that. I went to my attorney in Spokane, Mr. Mack. I did not ask him to come here and testify, I just asked him if he saw me and my wife at the Christian Science Church on Sunday, Oct. 14th, and he said he would testify I was there at noon, but he couldn't testify to any longer. I first saw the hotel register [32] in George Shallas' room about two weeks after this liquor deal, and George gave it to me to bring up to Mr. Wernette. I had it in possession for several hours and brought it up and gave it to Mr. Wernette.

"Q. How long did you have it in your possession?

(Testimony of Theodore Sievers.)

A. I think only so long as it takes to go from Spokane up here.

Q. Several hours? A. Yes.

Q. You brought it up and showed it to Mr. Wernette? A. I did.

Q. And later it was introduced in evidence here?

A. Yes.

Q. Did you ever have it in your possession again?

A. No."

The transaction with Suzanna Lawrence occurred around dusk. Tensed is in the neighborhood of sixty miles from Spokane. We made the trip from Spokane to Tensed by automobile, and stopped on our way at my brother's place at Spangle.

"Q. Did I understand you to say that you didn't leave Spokane until about one o'clock?

A. Something like that.

Q. You think you arrived at Tensed about four-thirty or five? A. Yes.

Q. You went by automobile? A. Yes.

Q. You made the trip by automobile?

A. Yes."

Redirect Examination.

(By Mr. LANGROISE.)

At the time I first talked with the defendant, George Shallas, relative to his testifying as to my being there during that time, I told him where I was on the evening of Oct. 14th and that I made the sale with which I was charged. I didn't see him or talk to him on the morning of Oct. 14th.

TESTIMONY OF W. A. SHAW, FOR PLAINTIFF.

W. A. SHAW was called and sworn as a witness in behalf of the plaintiff and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I reside at Tensed. I have lived there about six years, before that I lived at Davenport. I was at Tensed during Oct. 14th, 1928. On the afternoon of that date I was visiting at W. H. McNeil's at Tensed. The occasion was a kind of "Farewell Reception" given to a bunch of his Davenport friends. He was leaving Tensed and going back to Davenport. I saw Theodore Sievers in Tensed during the afternoon of Oct. 14th, 1928. I saw him drive up in a car in front of his residence. It was a Maxwell Coupe, his wife was with him. They got out of the car, went in the house, and he come back out and got some packages. I do not know whether they took out any before or not. He raised up the back part of the car, taken out some packages and went into the [33] house. He came back out—she didn't come back out." I passed the place where Theodore Sievers was living something around four o'clock and near five o'clock. I passed twice that afternoon. The Maxwell Coupe was there both times.

(Testimony of W. A. Shaw.)

Cross-examination.

(By Mr. PAINE.)

Q. How do you know it was four or five o'clock?

A. That is my best recollection. I know it was about five o'clock because I was getting my family ready to go home about five o'clock. I had fellows working for me and I was going home to get the horses lined up for the next day.

"Q. It wasn't right on the dot, five?

A. I wouldn't say right on the dot.

Q. It was around five o'clock? A. Yes.

Q. By that it might have been fifteen or twenty minutes either way?

A. It wouldn't have been that much. It might be five or ten minutes.

Q. And that was Sunday afternoon, the 14th of October? A. Yes.

Q. That one time you are real positive about the time?

A. I am about as near positive about the time that time and more so than any other time I have spoken about.

Q. You didn't talk to Mr. Sievers? A. No, sir.

Q. Or Mrs. Sievers? A. No."

TESTIMONY OF W. A. WEISS, FOR PLAINTIFF.

W. A. WEISS was called and sworn as a witness in behalf of the plaintiff and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I live about a mile and a half from Tensed. I am a farmer. I was in Tensed Oct. 14, 1928. I was at Mr. McNeil's for a farewell dinner he was giving there as he was closing up his business and leaving. It was Sunday. I know Mr. and Mrs. Sievers when I see them. I saw them around in front of their home in Tensed, Idaho, during the afternoon of Oct 14th, 1928. I seen them around their car three or four times that afternoon, in fact, Ted was working on the car, and he was in and out of the house and around the car practically all afternoon.

"Q. Did you see them more than once that day?

A. Yes, I seen them there around that car, probably three or four times that afternoon. In fact Ted was working on the car, and he was in and out of the house and around the car practically all afternoon.

Q. Did you have occasion to go by the house where he was living during the evening of October 14th, 1928?

A. No, I never went directly past the house.

(Testimony of W. A. Weiss.)

Q. Did you go close enough to it to see the front of it? A. Yes.

Q. Do you know what kind of a car Sievers was driving at that time? A. (No answer.)

Q. Open or closed?

A. It was, if I am not mistaken, it was a coupe.

Q. State whether or not you say any car standing in front of that place that afternoon?

A. Yes.

Q. What time was that?

A. Why I would say it was between half-past six and seven o'clock that evening. It was still there when I left for home." [34]

TESTIMONY OF W. H. PHILLIPS, FOR PLAINTIFF.

W. H. PHILLIPS was called and sworn as a witness in behalf of the plaintiff and testified as follows: [35]

Direct Examination.

(By Mr. LANGROISE.)

I am a farmer, laborer and logger. I live at Tensed. I was in Tensed a short time in the afternoon of October 14, 1928. I had dinner at Mr. McNeil's.

"Q. What was the occasion of your being there on that day?

A. I went down town after a paper along about noon or a little after.

(Testimony of W. H. Phillips.)

Q. Where did you eat dinner on the 14th?

A. At Mr. McNeil's.

Q. What was the occasion of your having dinner there?

Mr. PAINE.—We admit it was a farewell dinner.

Mr. LANGROISE.—Will you, and that it was the afternoon of October 14th, 1928?

Q. Do you know Mr. Sievers when you see him?

A. Yes.

Q. Did you see him the afternoon of October 14th, 1928, at Tensed, Idaho? A. Yes.

Q. Did you see his wife? A. Yes.

Q. Did you see his car in front of his place?

A. Yes.

Q. (The COURT.)—What time in the afternoon was this?

A. Well, I couldn't say exactly—along about one or one-thirty, somewhere along there. I don't know exactly, right around there somewhere."

Cross-examination.

(By Mr. PAINE.)

Q. You say you saw this car of Seivers there between one and one-thirty that afternoon?

A. Somewhere along about there.

Q. Not much later than half-past? A. No, sir.

Q. Probably nearer one o'clock?

A. Somewhere's around there.

(Testimony of W. H. Phillips.)

Redirect Examination.

(By Mr. LANGROISE.)

I saw them when I went there, there were two servings of dinner. I was a little late. McNeil called me in, some of the men had finished when I arrived and I had the second serving.

TESTIMONY OF W. H. McNEIL, FOR PLAINTIFF.

W. H. McNEIL was called and sworn as a witness in behalf of the plaintiff and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I reside at Davenport, Wash. I lived in Tensed, Idaho, the early part of October 1928. I was in business there. I left there around the 17th or 18th. I was at my place at Tensed the Sunday before I left to go to Davenport. We gave a dinner to some of our friends. Mr. W. H. Shaw, Mr. Phillips and Mr. Weiss were there. I know Mr. and Mrs. Sievers when I see them, they were driving a Maxwell Coupe about that time. I saw him during the afternoon of Oct. 14th, 1928, at Tensed, Idaho. They drove up in front of their house and got out. His wife went into the house and after he got out of the car, he went around and raised up the hamper and got [36] some parcels out and went into the house.

"Did you see the car go away from there?

(Testimony of W. H. McNeil.)

A. I didn't notice it being taken away from there after that.

Q. At any time that evening? A. No, sir.''

Cross-examination.

(By Mr. PAINE.)

I couldn't say when I first saw the car there. We had dinner about one o'clock. I and the boys had eaten dinner and gone outside. We were out in front, probably one-thirty or two o'clock, and they drove up while we were out in front talking. I don't know how long after lunch it was, I didn't look at the clock. This was first called to my attention after Oct. 14th, not long ago. I got information, I would be subpoenaed as a witness about three weeks ago. Mr. Shaw mentioned it to me a little while before that, and that is the first time the matter was called to my attention since Oct. 14th.

TESTIMONY OF P. J. HART, FOR PLAINTIFF.

P. J. HART was called and sworn as a witness in behalf of the plaintiff and testified as follows:

Direct Examination.

(By Mr. LANGROISE.)

I am a Special Officer of U. S. Indian Service and reside at Plummer, Idaho. I was at Tensed on Oct. 14th, 1928. I saw Theodore Sievers there

(Testimony of P. J. Hart.)

that afternoon, I saw his car, a Maxwell Coupe. His car was in front of his place in the evening of Oct. 14th, I saw it several times.

"Q. Did you have occasion to go through Tensed during the evening of October 14th? A. I did.

Q. State to the jury whether or not his car was still in front of his place at the time? A. It was.

Q. Did you have occasion to go through Tensed again, after that? A. I did.

Q. When? A. Several times that evening.

Q. It was there? A. Yes.

Q. Did you have occasion to go by there during the early morning of the 14th? A. I did.

Q. What time? A. I should judge—

Q. The 15th I mean? A. Six o'clock.

Q. State to the Court and jury whether or not—

Mr. PAINE.—Now, I object to this testimony—

Mr. LANGROISE.—It is a circumstance showing whether or not the car was there the evening of October 14th, by showing it was still there at six o'clock the morning of the 15th. We want to show that in the early morning, around six o'clock, the car was still there.

Mr. PAINE.—I object, your Honor, that it is outside the issues here to show where this man Sievers was on the 15th. The Government has given us no warning that it was going to try—

The COURT.—Yes. I have ruled on that. Sustained.

Mr. LANGROISE.—The Government rests."

[37]

(Testimony of M. E. Mack.)

Mr. PAINE.—At this time I have a motion I would like to make in the absence of the jury.

The COURT.—Gentlemen of the Jury, you will remember the admonitions I have given you. I will excuse you from the courtroom for a few minutes.

(Jury excused.)

Mr. PAINE.—The Government having rested, at this time the defendant moves the Court to direct the jury to return a [38] verdict of not guilty upon this indictment on the ground that there is no sufficient corroboration.

The COURT.—(After argument.) After taking into consideration all the circumstances, I think there is sufficient corroboration, and I will have to deny the motion and let the case go to the jury. There is enough here to let the case go to the jury.

Mr. PAINE.—May I have an exception?

The COURT.—Yes.

WHEREUPON, after an opening statement by counsel for the defendant the following proceedings were had:

TESTIMONY OF M. E. MACK, FOR DEFENDANT.

M. E. MACK, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

(By Mr. PAINE.)

I am an attorney practicing in Spokane, Wash.

(Testimony of M. E. Mack.)

I am an officer of the Christian Science Church at Spokane. I know Mr. and Mrs. Sievers very well and Mrs. Sievers' sister, Ruby Ohler. I saw Mr. and Mrs. Sievers and Miss Ohler at the Christian Science Church in Spokane, Wash., on Oct. 14th, 1928, at five or ten minutes after twelve, noon.

TESTIMONY OF RUBY OHLER, FOR DEFENDANT.

RUBY OHLER, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

(By Mr. PAINE.)

I reside at St. Luke's Hospital, Spokane, Wash. I am in training there as a nurse. I am a sister of Mrs. Theodore Sievers. On Oct. 14th, 1928, I left the hospital about eight-thirty A. M. and went down and met my sister's husband in front of the hotel, and I got in the car and rode around until church time, and my sister and I went to church at the Christian Science Church, where we saw Mr. Mack. Church was out a quarter or [39] twenty minutes after twelve. I met my brother-in-law and we drove out east to Dishman. They stopped at a fruit-stand and bought apples and so forth, and drove back to town, and stopped at Sullivan's Cafeteria and ate lunch, and it was a little after one then, then we went to eat and after we came out I didn't get into the car. I left them about one-thirty.

(Testimony of N. D. Wernette.)

It might have been a little later because my sister met an old school chum in Sullivan's Cafeteria and had quite a chat with her. It might have been a quarter to two.

TESTIMONY OF N. D. WERNETTE, FOR DEFENDANT.

N. D. WERNETTE, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

(By Mr. PAINE.)

It is not a fact that Ted. Sievers came to me before the trial of his liquor case in November and informed me that he had been in Tensed at the time of the alleged offense and that he didn't think anyone saw him, and that I suggested it would be his best defense to get some witnesses. He did not tell me before the trial of his case that he had sold the liquor in question and that he was in Tensed that afternoon. He told me that he was at a different place and had witnesses to prove that he wasn't there at that time. I told him if he had such witnesses to go get them.

TESTIMONY OF W. D. McREYNOLDS, FOR DEFENDANT.

W. D. McREYNOLDS, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

(By Mr. PAINE.)

I keep the records of the United States Commissioners in this district. Defendant's Exhibit No. 4 is a report of the United States Commissioner from the official files of this court. (Exhibit No. 4, being report of the Commissioner binding Mrs. Laura Sievers and Hattie Ohler over to the Grand Jury on a charge [40] of perjury, admitted in evidence.)

I have examined the returns of the Grand Jury at this session and no indictments were returned against Mrs. Laura Sievers or Hattie Ohler.

TESTIMONY OF GEORGE SHALLAS, FOR DEFENDANT.

GEORGE SHALLAS, the defendant in the above-entitled cause, after having been first duly sworn on oath, testified as follows:

Direct Examination.

(By Mr. PAINE.)

I am the defendant in this action. I am a merchant and proprietor of the Ethlyn Hotel, Spokane, Wash. I have been running it about two years.

(Testimony of George Shallas.)

I testified in the case of the United States vs. Ted. Sievers at Coeur d'Alene Nov. 28th, 1928. I did see Mr. Sievers at my hotel on Oct. 14th, 1928, in the morning after breakfast, it might have been nine o'clock, it might have been later on, it might have been sooner. I saw him again after lunch, I don't know the exact hour. I didn't take notes, I seen they went to the room. Mr. Sievers came to the hotel some ten days or two weeks later and talked to me in regard to his having been there on Oct. 14h: He come up with wife—they tell me that if I remember last time up at the hotel, and I told him I did. I do not remember the date, but they told me, you know, charged with selling liquor to some Indian woman down near Tensed. So he told me if I would give him—he told me if I could give him the register sheet he could take it over to Coeur d'Alene to the attorney, and I told him he could have it. They wanted to know if I would come to testify for them in regard to it. I gave them Plaintiff's Exhibit No. 3 at that time. He took it with him. I seen it next when I came here to court in November. It was shown to me then. I identified the signature of Mrs Sievers, the erasure was not called to my attention at that time. I did not testify in regard to the fact that room 36 was rerented on [41] Sunday the 15th of October, I did not make any change on the line, third from the bottom, on the back side of Exhibit No. 3 where it shows A. J. Logie registered from Seattle, room 36. I did not erase one figure out and write in

(Testimony of George Shallas.)

another. Mr. Sievers told me he was in Spokane. He arranged to have that room Sunday night, I did not know whether they slept in the room. There was no conversation about making an alibi. He did not ask me to change the register, he asked me to give it to him to take to his attorney. He came back some time later and asked for a receipt, that he paid for the room. I gave him sort of a receipt and I have never seen it since.

Cross-examination.

(By Mr. LANGROISE.)

Sam Sallinas operates the Ethlyn Hotel with me. Steve Pollis and Jim Pattis were working there for me in October, 1928. The receipt I gave Mr. Sievers showed he paid the rent, I don't remember it showed any days, it showed one or two nights. I do not remember about that receipt at all. I remember him getting the receipt. I remember that I testified that he occupied those rooms for the 13th and 14th and didn't go out until the 15th. I testified that he didn't check out until the morning of the 15th, that he paid me. Mrs. Sievers paid me one night's room when she came there Saturday night, Mr. Sievers paid some more, I don't remember if it was on the morning of the 15th. The room was paid in advance as I recall. I saw him the morning of the 15th. When I was on the witness-stand at the last trial, I testified, Q. "Who, if anybody did the checking out, who did they pay there? A. Personally to me. Q. Mr. Sievers did?

(Testimony of George Shallas.)

A. Yes." Yes, Sievers paid the money when he checked out. I testified he checked out on Monday morning the 15th. There is no chance about my being mistaken about seeing them a couple of times on Oct. 14th. I testified definitely that I saw him twice between three and five o'clock, and as best I can recall, I did. I did not say [42] as best I can recall before.

"Q. You were asked on cross-examination whether or not—you were asked a number of times about it and finally you were asked "Any chance about your being mistaken? A. No, sir."

Mr. PAINE.—Where is that?

Mr. LANGROISE.—Page five.

Q. You didn't—no change of your being mistaken about seeing them there that evening? (Witness shown copy of testimony.)

A. I seen a copy of this before.

Q. Did you? A. That evening.

Q. The 14th—I am talking about the 14th.

The COURT.—Let him read the testimony.

(Witness reads record.)

"Q. No chance of your being mistaken about your seeing them a couple of times on October 14th?

A. Yes.

Q. You testified did you not definitely that you saw him twice between three and five o'clock.

A. Yes.

Q. Did you, if you know?

A. As best I can recall.

(Testimony of George Shallas.)

Q. You didn't say as best you could recall—you said specifically between three and five in the afternoon of October 14th, didn't you? A. Yes.

Q. You didn't say as best you could recall at that time, did you?

Mr. PAINE.—The record is the best evidence of what he said.

Mr. LANGROISE.—I am asking him if he knows.

A. I do not remember what I said on my last testimony.

Q. Run through your testimony—I will give you time.

A. I said between three and five—probably I didn't put any limit on time.

Q. Did you say to the best of your recollection anywhere in there? A. No, sir.

Q. You were positive about it?

A. It might have been a little after three.

Q. You saw him twice between three and five?

A. He went back to the room—Sievers went out and come back again and they went out.

Q. You saw him the morning of October 14th?

A. Yes." [43]

I said between three and five. I didn't say to the best of my recollection. It might have been a little after three. Sievers went back to the room, he went out and come back again and they went out. I am an early riser and I saw Sievers on the morning of the 14th. I am always on duty at seven o'clock, I get up all the time at seven o'clock. I have no other business besides operating the Ethlyn

(Testimony of George Shallas.)

Hotel. I have been in Spokane the last twenty years, in business there the last ten years, different businesses, running a pool-hall and a fruit store, the pool-hall was eight or nine years ago, I don't operate it now, I was in the fruit business about eight or nine years ago, also the hotel business.

Q. Mr. Shallas, when Mr. Sievers came to see you and told you that he was in trouble for the sale of liquor down at Tensed that afternoon of October 14th, 1928, he at that time explained to you and told you that he wanted a period for an alibi of two nights and three days at your place—one day before and one day after the sale, and you asked him, did you not, well, did anyone see you when you got down there? A. I did not.

Q. And you asked him whether the officers picked him up that night, or did they wait? A. No, sir.

Q. You asked him different questions about the likelihood of your getting in trouble if you came up here and testified to that? A. No, sir.

Q. You said, "All right, we will fix it up?"

A. No, sir, I never had no conversation about that at all.

Q. I will ask you whether or not you got the hotel register while you were talking to him?

A. He asked for it and I gave it to him.

Q. And when you got the hotel register and looked at it, where he registered for room 36, and then you got down here and found that room 36 was again rented out for the 14th, so for you say that they were there on the 13th and 14th and checked

(Testimony of George Shallas.)

out the morning of the 15th, you couldn't have room 36 rented to anyone else until the 15th, and it was then that you changed it [44] and made that erasure? A. I did not.

I don't know Mrs. Sievers signature. I did not see her register. I was sitting in the lobby. At the time she registered she paid for one night. she didn't say only one night she wanted a room—just got the room and didn't say nothing.

Q. You testified, did you not, at the last trial on direct examination by Mr. Wernette: "Q. Do you remember th*ere* checking out there Monday? A. The 15th, yes." I will read just before that: "Q. Did they stay at the hotel Sunday night?" And you answered "They did."

A. I didn't see them.

Q. But you answered that way there? A. Yes.

Q. Did they stay there Sunday night?

A. They had a room occupied—I do not know whether they slept there or not.

Mr. PAINE.—That is argumentative. He has already admitted that he testified to that.

Mr. LANGROISE.—I am going to find out what is right.

The COURT.—You asked him did he testify to that.

Mr. PAINE.—And he has already testified to that."

Q. At the time of the last trial against Theodore Sievers, held on November 28, Plaintiff's Exhibit

(Testimony of George Shallas.)

Number Three, which was then Defendant's Exhibit Number Two, was identified by you, was it not, and offered in evidence?

A. Yes. When I came down here and testified on Nov. 28th, 1928, I knew what Sievers was charged with.

Q. You knew he was charged with the possession and sale of whiskey at Tensed, Idaho, during the late afternoon?

A. I didn't know—I knew it was a liquor case.

Q. You knew what was supposed to have happened? A. I didn't get that.

Q. You knew when the sale was supposed to have occurred?

A. Yes, he told me he sold some liquor down at Tensed some place.

Q. How was that?

A. Charged with some liquor down near around Tensed.

Q. When? A. In October some time.

Q. When did the defendant tell you when he was charged with the sale of liquor?

A. Two weeks afterwards.

Q. Did he tell you the date he was supposed to have sold it?

A. He said he was charged with it the day he was at the hotel.

Q. What day?

A. The 14th of October, 1928.

Q. When you came down here you knew he was

(Testimony of George Shallas.)

charged with the sale of liquor on the 14th day of October at Tensed, Idaho, didn't you? A. Yes.

Q. And you knew at that time that you testified that they were at the hotel on the 13th, 14th [45] and 15th of October, 1928?

A. I seen them in the afternoon of the 14th. I didn't see them in the evening at all.

I testified I saw him on the 15th, checked out with me personally, I testified I saw him on the 13th and saw him register in.

Redirect Examination.

(By Mr. PAINE.)

My best recollection is that they didn't check out till the 15th. My best recollection is they stayed there on the 13th, 14th and 15th and that I saw them there Sunday afternoon or Monday.

The COURT.—Both sides rest?

Mr. LANGROISE.—Yes.

Mr. PAINE.—Yes.

Mr. PAINE.—At the close of all the testimony in the case, the defendant renews its motion for a directed verdict in his favor. I do not think this case should be submitted to the jury.

The COURT.—I think there is evidence here sufficient for the jury to pass on. The motion will be denied.

Mr. PAINE.—Exception.

The defendant presented to the Court the following instructions with the request they be given the jury:

No. I.

You are instructed that a statement purposely made cannot be said to have been corruptly made if made by or through mistake or inadvertence so that the defendant believed in good faith that the facts he testified to were in fact true, although actually false.

No. II.

You are instructed that the defendant is charged with falsely testifying in a criminal proceeding in this court in [46] substance and effect that he saw one Theodore Sievers at the Ethlyn Hotel at Spokane, Washington, on the 14th day of October, 1928. The Government has alleged that such testimony was false and that the said George Shallas did not see the said Theodore Sievers in Spokane, Washington, during the afternoon and evening of October 14th, 1928, or at any other time on that date.

I instruct you that the burden of proof is on the Government to prove the alleged false statement beyond a reasonable doubt. You cannot find the defendant guilty unless you believe beyond a reasonable doubt that the defendant, George Shallas, never saw the said Theodore Sievers in Spokane, Washington, on October 14, 1928.

No. III.

You are instructed that if this defendant, George Shallas, saw the witness Theodore Sievers in Spokane, Washington, on October 14, 1928, in the afternoon of said date, and honestly believed the time to have been at or near three o'clock of said day, then

the fact that the actual time he saw Sievers was somewhat earlier then three o'clock would not be material, and you cannot find the defendant guilty as charged.

WHEREUPON, after argument to the jury by counsel on both sides, the following instructions were given by the Court:

INSTRUCTIONS OF COURT TO JURY.

Gentlemen: I shall have to ask your patience for a few minutes while I present to you the principles of law applicable to this case. The defendant has entered a plea of not guilty to the charge set forth in this indictment. That means that he denies the charge therein set forth, and he is presumed to be innocent until proven guilty beyond a reasonable doubt. The burden of proof is upon the Government to show that he is guilty by that degree of proof. I have referred to the term reasonable doubt. A reasonable doubt is such a doubt as the term implies—a doubt for [47] which you can give a reason. It is not a speculative or conjectural doubt. It is a doubt which is created by the want of evidence, or may be created by the evidence itself. It is such a doubt as would cause a man of ordinary prudence, sensibility and understanding in determining an issue of like concern to himself as that before the jury to the defendant, to pause or hesitate in arriving at his conclusion. A juror is satisfied beyond a reasonable doubt when he is con-

vinced of the truthfulness of the charge to a moral certainty. So in this case if, after you have fairly considered all the evidence, you can conscientiously say to yourself that you are fully convinced, that is, that you have such an abiding conviction of guilt as you would be willing to act upon in the most important affair of your own lives, in that case you would not have a reasonable doubt and it would be your duty to convict. Upon the other hand, if after such consideration, you cannot candidly say that you have such abiding conviction of guilt, then you would have a reasonable doubt and it would be your duty to acquit.

As you have been told the Grand Jury in this district has presented to this Court the indictment against the defendant George Shallas, charging him with having committed the crime of perjury as set forth in the indictment which has been called to your attention. The issue really before you arises in this way: There is a statute of the United States which prohibits the having possession of intoxicating liquor, or selling intoxicating liquor. Heretofore a charge was brought against Theodore Sievers in this court, setting forth, in substance, that he did on or about October 14, 1928, at Tensed, Idaho, unlawfully have in his possession intoxicating liquor, namely, one pint of moonshine whiskey, and at the same time and place he did unlawfully sell intoxicating liquor, namely, one pint of moonshine whiskey. Thereafter Mr. Sievers plead not guilty to that charge, or charges,

and the matter came on for trial in an ordinary way, such as we are trying this case [48] before you, and it is alleged in the present indictment that Mr. Shallas was sworn as a witness in the Sievers case, and being sworn, gave testimony. The testimony that he is alleged to have given at that time and is now alleged to have been false and perjured is the testimony which is specifically set forth in the form of questions and answers in this indictment. It is charged in this case that in giving that particular item of testimony the defendant committed perjury, and perjury is defined by the statutes of the United States as a criminal offense, as it is there provided that "Every person who having taken an oath before a competent tribunal, officer or person or in any state in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify *truly,* or that any written testimony, declaration, deposition or certificate by him subscribed is true, wilfully and contrary to such oath take or subscribe any material matter which he does not believe to be true, is guilty of perjury."

You will note that to commit perjury the testimony must be given in a case or a trial of which the court has jurisdiction, and after an oath is administered to the witness giving the testimony, and such testimony must relate to a material matter, a material issue. I charge you specifically that this court, where it is alleged that such testimony was given, had jurisdiction of the charge set forth in the information in that case, and which was being tried.

I further charge you that the material issue in this case is whether or not Theodore Sievers had in his possession intoxicating liquor or sold intoxicating liquor. If you find from the evidence that the defendant George Shallas testified in the case of United States vs. Theodore Sievers that he saw Theodore Sievers at the Ethlyn Hotel in Spokane, Washington, on the afternoon of October 14th, 1928, between three and five o'clock, [49] you are instructed that such testimony was upon a material matter therein. I will further state to you that in the trial of that case, United States *versus* Theodore Sievers, referred to in this indictment, it was, as alleged in the indictment, material to know whether or not Theodore Sievers was in Tensed, Idaho, on the afternoon and evening of October 14th, 1928, and testimony in said trial relevant to that matter was material therein.

As I have already stated to you, in order to commit perjury the testimony must be given under oath. The Government here has presented the Clerk of the court, Mr. McReynolds, who testified before you this morning. I charge you as a matter of law that he has authority to administer oaths in this court. I cannot charge you as a matter of fact that he did administer the oath to Mr. Shallas before he, Mr. Shallas, gave the testimony claimed to be perjured, but you have heard the Clerk testify. He testified that he did so administer the oath, and if you believe his testimony beyond a reasonable doubt that would dispose of that issue.

The next question is as to whether or not the defendant George Shallas when he was testifying in that case, gave the testimony that he is now charged with having given, and in that regard you are concerned with whether or not when Shallas was testifying before in that case he testified substantially as set forth in the indictment.

The indictment charges, among other things, that the defendant Shallas, having been duly sworn as a witness in this court in the case of United States *versus* Theodore Sievers, then on trial herein, on November 28, 1928, wilfully, unlawfully, corruptly, falsely and feloniously swore in substance, in the language set forth in the indictment, that he, Shallas, saw Theodore Sievers, the defendant, then on trial, at the Ethlyn Hotel, in Spokane, Washington, on Sunday, October 14th, 1928, at [50] between nine and ten in the morning, and twice between three and five in the afternoon, and that he stayed at said hotel Sunday night, October 14th. The falsity is alleged to be in that Shallas knew that Sievers was not at the Ethlyn Hotel in Spokane, Washington, during the afternoon and evening of October 14th, 1928, between three and five o'clock, or at any other time on that date, and that Shallas did not see Sievers during the afternoon of October 14, 1928, in said hotel, or elsewhere in Spokane, Washington.

You are instructed that to find the defendant guilty it is not necessary that you find that he knowingly testified falsely in all the respects alleged, but

it is sufficient if you find that he knowingly falsely testified in any one of the respects alleged, that is, either that Sievers was not at said hotel in Spokane, Washington, between three and five o'clock on the afternoon or evening of October 14, 1928.

I will say to you further that if you believe that the defendant saw the witness Theodore Sievers in Spokane, Washington, on October 14th, 1928, in the afternoon of said date, and honestly believed the time to have been at or near three o'clock of said day, or between three and five o'clock in the afternoon, and that he was honestly mistaken as to the exact time, then as to that particular time he would be not guilty of perjury.

You are further instructed that a statement purposely made cannot be said to have been corruptly made if made by or through mistake or inadvertance so that the defendant believed in good faith that the facts he testified to were in fact true although actually false.

In determining whether or not he so testified you are to consider in this case the testimony given by all of the witnesses who have testified in regard to that matter. If you find from the testimony given by the Government witnesses that he did so testify at that trial as I have stated to you, then you have [51] the final issue, and that is, whether or not his testimony so given was true or false, and when I say true or false I mean something more than merely being mistaken. One cannot be charged, that is properly charged, with committing perjury

unless he wilfully, that is, knowingly testifies falsely —if he knowingly testifies to something he does not believe to be true—that is what is meant by perjury. Human memory is fallible, the human eye is fallible—we see things differently and remember things differently—so the law does not contemplate that a man should be punished for an honest mistake.

To this last issue, that is, whether or not in fact the defendant did testify falsely as charged in this indictment—on that issue you will consider all of the testimony which has been offered here. Many witnesses have testified on both sides of the proposition.

There is a further principle closely related to this which is peculiarly applicable to a perjury case of this kind. The jury is not warranted in convicting one who is charged with perjury upon the uncorroborated evidence or testimony of a single witness. That is due to the fact that generally speaking the testimony which is charged to be perjured has been given under oath, and it is not regarded as legally sufficient that another witness by his testimony challenge the testimony so given under oath. It is setting the testimony of one human being against another, and while one may be more credible than the other, the law provides that you cannot properly convict one upon the uncorroborated testimony of a single witness. There must be at least two witnesses or there must be the testimony of one witness corroborated by another witness of other facts and circumstances in evidence.

The issues of fact, as you know, are for you and you alon*g* to decide, and that being true you become the sole judges [52] of the evidence, the credibility of the several witnesses who have testified, and the weight to be given to the testimony of each. In doing so you resort to your common sense. In your experience you have had in human affairs you have come to know what motive actuates witnesses in testifying before you, and you will follow those rules which you consciously or unconsciously have learned in your experience with your fellowmen.

Form of verdict has been prepared. Your verdict must be unanimous. You may retire with the bailiff. [53]

Mr. PAINE.—Before the jury retires I desire to present a few exceptions.

The COURT.—You may do so. The jury will just stay there at the door.

Mr. PAINE.—I except to the refusal of the Court to give defendant's instruction number two.

I also except to that portion of the instructions which begins with the word "To find the defendant guilty it is not necessary that you find that he knowingly testified falsely in all the respects alleged, but it is sufficient if you find that he knowingly falsely testified in any one of the respects alleges, that is, either Sievers was not at the hotel between three and five o'clock in the afternoon or evening of October 14th, 1928."

The COURT.—I will say to you again, Gentlemen, that when I referred to the testimony set forth in the indictment which was alleged to have been

given by the defendant at the trial of United States *versus* Theodore Sievers, that you are to understand that I was referring to the charge as to the testimony that was given in that case.

I think I said to you and I will say to you again that the falsity of that testimony—any part of it alleged in this indictment—is alleged to be in that Shallas knew that Sievers was not at the Ethlyn Hotel in Spokane, Washington, during the afternoon and evening of October 14th, 1928, between three and five o'clock of that afternoon, or any other time on that day, and that Shallas did not see Sievers during the afternoon of October 14, 1928, in said hotel, or elsewhere in Spokane, Washington. That is the charge of falsity made in this indictment. I say to you again that if you find—to find the defendant guilty it is not necessary that he knowingly testified falsely in all the respects charged, but it is sufficient if you [54] find that he knowingly f*la*sely testified in any one of the respects alleged, that is, either that Sievers was not at said hotel in Spokane, Washington, between three and five o'clock on the afternoon or evening of October 14, 1928. In other words, the falsity charged in this indictment is that Sievers was not at the hotel at between the hours of three and five on the afternoon of October 14, 1928, or the evening of October 14th, 1928.

Mr. PAINE.—May I have the same exception to the last?

The COURT.—Yes. [55]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

State of Idaho,
District of Idaho,—ss.

I, Charles C. Cavanah, United States District Judge for the District of Idaho, and the judge before whom the above-entitled action was tried, to wit: the cause entitled United States of America, Plaintiff, vs. George Shallas, Defendant, which is No. 2923 in said District Court.

DO HEREBY CERTIFY, that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record herein, and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record therein, and contains all of the evidence, oral and in writing therein, with the exception of Plaintiff's Exhibit No. 3, the original of which is hereby directed to be sent to the Circuit Court of Appeals ~~by the Clerk of this court and that the above and foregoing bill of exceptions was duly and regularly filed with the clerk of said court and regularly served within the time authorized by law and that no amendments were proposed to said bill of exceptions except such as are embodied therein, and that due and regular written notice of application to the court for settlement and certifying said bill~~

~~of exceptions was made and served upon the Plaintiff, which notice specified the place and time (not less than three days nor more than ten days after the service of said notice) to settle and certify said bill of exceptions dated~~

Dated at Boise, Idaho, this 14th day of August, 1929.

CHARLES C. CAVANAH,
District Judge.

Exception allowed the Government to the order settling the bill of exceptions.

CHARLES C. CAVANAH,
Judge. [56]

[Endorsed]: Lodged August 5, 1929. Filed August 14, 1929. [57]

[Title of Court and Cause.]

MOTION TO STRIKE DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

Comes now the United States of America and makes the following motion to strike defendant's proposed bill of exceptions, upon the ground and for the reason that the said proposed bill of exceptions has not been filed or lodged within the time prescribed by Rule 76, of this court.

This motion is based upon all the records and files in the above-entitled case and upon the minutes of the Clerk of the United States District Court, for the District of Idaho, Northern Division, showing the adjournment of the May term of said court.

Dated this 12th day of August, A. D. 1929.

W. H. LANGROISE,

Attorney for Plaintiff United States of America.

The above motion is denied, and exception is allowed.

CHARLES E. CAVANAH,

Judge.

[Endorsed]: Filed August 12, 1929. [58]

At a stated term of the District Court of the United States for the District of Idaho, Northern Division, begun and held at the city of Coeur d' Alene, on June 4, 1929. Present: the Honorable CHARLES C. CAVANAH, Judge.

Among the proceedings had were the following, to wit:

CRIMINAL—No. 2923.

United States of America,

vs.

George Shallas,

Defendant.

MINUTES OF COURT—JUNE 4, 1929—TRIAL.

This cause came on for trial before the Court and a jury, W. H. Langroise, Assistant District Attorney appearing for the United States, and Messrs. Robertson and Paine appearing as counsel for the defendant, who was also present.

The Clerk, under directions of the Court, pro-

ceeded to draw from the jury-box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury. O. E. Tallman, whose name was so drawn, was excused for cause; and Nick Lommell, whose name was also drawn, was excused on the plaintiff's peremptory challenge; and S. B. Roseboro, Harve Renfro, and Chas. W. Kellogg, and A. A. Campbell, whose names were likewise drawn, were excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury-box, who were sworn and examined on *voir dire,* found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit: C. E. Allison, O. J. Lynge, Marcus Anderson, Edw. E. Kyle, Sam B. Wood, Fulton Cook. O. F. Leonard, J. E. Smith, Dave Cleland, W. F. Breshears, C. K. Couchman and J. C. Proffitt.

The indictment was read to the jury by the Assistant District Attorney who informed them of the defendant's plea entered thereto, whereupon, W. D. McReynolds, Leo G. Hamilton, Theodore Sievers, W. H. Langroise, N. D. Wernette, W. A. Shaw, [59] W. A. Weeks, W. H. Phillips, W. H. McNeil and R. J. Hart were sworn and examined and other evidence was introduced on the part of the United States and here the plaintiff rests.

The defendant, through his counsel, at this time moves the Court to direct the jury to return a verdict of not guilty. After hearing argument of

counsel on the motion, the Court denied the same, allowing exceptions to the defendant.

M. E. Mack, Ruby Ohler and George Shallas were sworn and examined as witnesses on the part of the defendant and N. D. Wernette and W. D. McReynolds were recalled and further examined and here the defendant rests and both sides close.

The defendant's motion for a directed verdict was renewed by his counsel and was denied by the Court with exceptions allowed the defendant.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict. While the jury was still out, the Marshal was directed to provide them with dinner at the expense of the United States.

On the same day the jury returned into court, the defendant and his counsel being present, whereupon, the jury presented their written verdict, which was in the words following:

(Title of Court and Cause.)

VERDICT.

"We, the Jury in the above-entitled case, find the defendant George Shallas Guilty as charged in the indictment.

FULTON COOK,
Foreman."

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

Four o'clock P. M. June 5, 1929, was fixed as time for judgment herein. [60]

United States of America,
District of Idaho,—ss.

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of record of trial held on June 4, 1929, in the case of United States of America vs. George Shallas, Defendant, No. 2923, Northern Division, Criminal has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court in said District this 10th day of August, 1929.

[Seal] W. D. McREYNOLDS,
Clerk.
M. Franklin,
Deputy. [61]

United States of America,
District of Idaho,—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the May Term, 1929, of the United States District Court for the District of

Idaho, Northern Division, was adjourned without day on June 19, 1929.

IN TESTIMONY WHEREOF, I have set my hand and the seal of said Court in said District this 10th day of August, 1929.

[Seal] W. D. McREYNOLDS.
W. D. McREYNOLDS,
Clerk. [62]

[Title of Court and Cause.]

AFFIDAVIT OF DENE HICKMAN.

State of Idaho,
County of Ada,—ss.

Dene Hickman being first duly sworn upon his oath deposes and says:

That he is a special agent of the Treasury Department and that he has been in the employ of the Government for approximately three years in connection with special investigations for the Treasury Department. That during the latter part of May and the early part of June of 1929, he was in the city of Coeur d'Alene, Idaho, in connection with the investigation of the case of the United States of America vs. George Shallas, together with other matters that he was then investigating.

That he saw Laura Seivers in the office of the District Attorney for the District of Idaho, at Coeur d'Alene, Idaho, during the latter part of May when she was advised that her case would

not be presented to this Grand Jury, and that she might go home if she desired. [64]

That he was present in the courtroom during the presentation of the evidence of the Government in the case of United States of America vs. George Shallas. That after all of the evidence in the Government's case had been presented and the Government rested and during the argument of the motion for a directed verdict in behalf of the defendant Shallas, that Laura Seivers entered the courtroom at Coeur d'Alene, Idaho; that she walked down the center aisle of the courtroom to the front row of seats.

That he then took Theodore Seivers and with Mr. Hart and Laura Seivers, went into the office of the United States Attorney where they talked with Laura Seivers. That all of the facts leading up to and including October 14th, 1928, as well as the 15th of October, 1928, were gone over at that time, with Laura Seivers, for the first time by the Government. Her statements were identical with those of Theodore Seivers, with the exception that she stated at that time that she thought that they had gone back to the Ethelyn Hotel after lunch so her husband, Theodore Seivers could get some articles for her that she had left in the room. Theodore Seivers, her husband, who was present during all of this conversation, together with Mr. Hart, special agent of the Indian Service, stated to her that she was mistaken, that the time that he had gone back for articles she had left in the room was on a previous occasion and that they did

not go back to the Ethelyn Hotel on October 14th, 1928, and at that time, Theodore Seivers detailed to his wife, Laura Seivers, the exact route they took when they left Spokane, Washington, on October 14th, 1928. After he had done this, Laura Seivers replied "You might be right, and it might have been an earlier time, but it is in my mind it was that day." Theodore Seivers then stated that she was absolutely mistaken, and that it was at another time, because this transaction was firmly fixed in his mind.

After having talked with Laura Seivers and Theodore Seivers in the presence of Mr. Hart, he (this affiant) went into the courtroom at which time the defense was putting on its testimony and told Mr. Langroise who was trying the case for the Government, that he had talked with Laura Seivers and Theodore Seivers, and that [65] their stories were identical, with the exception that Laura Seivers thought that they had returned to the Ethelyn Hotel on October 14th, 1928, to get some articles that she had left in the room, and he also told Mr. Langroise that Theodore Seivers had positively stated that she was mistaken, and that this had occurred on an earlier date, and that he then detailed to her the route that they had taken leaving Spokane, Washington, that day, and that they did not go near the Ethelyn Hotel, to which she had answered that he might be right, but that it was in her mind that they had returned.

After detailing this to Mr. Langroise, Mr. Langroise told him to release her and let her go home

as the Government's case was in, and that the Government could not use her anyway. He then returned to the United States Attorney's office, secured her witness card and had one of the members of the U. S. Attorney's office sign it for her release and took her into the U. S. Marshal's office for the payment of her fees, so that she might return home.

Laura Seivers was never asked by this affiant or by Mr. Hart the special officer, in affiant's presence, to testify to anything other than the facts she knew. That he never turned her over to the custody of the marshal or the custody of anybody.

Affiant further states that he is the same person referred to in the affidavit of Laura Seivers as Dave Hickman, Special Agent of the Department of Justice.

(Signed) DENE HICKMAN.

Subscribed and sworn to before me this 9th day of July, A. D. 1929.

[Seal] W. D. McREYNOLDS,
Clerk U. S. District Court.
By F. M. Hughell,
Deputy.

[Endorsed]: Filed July 9, 1929. [66]

AMENDMENTS TO BILL OF EXCEPTIONS.

"A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial, if the ruling was

made during the trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the Clerk must, as soon as practicable, thereafter notify or inform both parties of the time so designated by the Judge.

In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk."

Rule 76—Rules of Practice, of the U. S. District Court for the District of Idaho.

The foregoing proposed amendments are allowed as a part to the bill of exceptions, Aug. 14th, 1929.

CHARLES C. CAVANAH,
Judge. [67]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

George Shallas, defendant in the above-entitled cause, feeling aggrieved by the judgment and sentence rendered and entered in said cause on the 5th day of June, 1929, does hereby appeal from the said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by

law, and that a transcript of record, proceedings and papers upon which said judgment and sentence were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such case made and provided.

ROBERTSON & PAINE,
Attorneys for Defendant.

ORDER.

IT IS HEREBY ORDERED that the appeal of George Shallas be and the same hereby is allowed and that said George Shallas be admitted to bail upon giving bond as required by law in the sum of $4,000.

Dated this 5th day of June, 1929.

CHARLES C. CAVANAH,
U. S. District Judge.

[Endorsed]: Filed June 5, 1929. [68]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the above-named defendant and herein files his assignments of error committed by the trial judge in the proceedings in the trial of the above-entitled cause, to wit:

I.

That the Court erred in denying defendant's motion for a directed verdict at the close of the

plaintiff's case because of the insufficiency of the testimony.

II.

That the Court erred in denying defendant's motion for a directed verdict at the close of all the testimony because of the insufficiency of the testimony.

III.

That the Court erred in refusing to give defendant's requested instruction No. 2, reading as follows:

> "You are instructed that the defendant is charged with falsely testifying in a criminal proceeding in this court in substance and effect that he saw one Theodore Seivers at the Ethlyn Hotel in Spokane, Washington, on the 14th day of October, 1928. The Government has alleged that such testimony was false and that the said George Shallas did not see the said Theodore Seivers in Spokane, Washington, during the afternoon and evening of October 14, 1928, or at any other time on that date. I instruct you that the burden of proof is on the Government to prove the alleged false statement beyond a reasonable doubt. You cannot find the defendant guilty unless you believe beyond a reasonable doubt that the defendant George Shallas never saw the said Theodore Seivers in Spokane, Washington, on October 14, 1928." [69]

IV.

The Court erred in instructing the jury that the

indictment charged that the defendant George Shallas wilfully, unlawfully, corruptly, falsely and feloniously swore that the witness Theodore Seivers stayed at the Ethlyn Hotel in Spokane, Washington, Sunday night, October 14, 1928.

V.

The Court erred in instructing the jury as follows:

> "You are instructed that to find the defendant guilty it is not necessary that you find that he knowingly testified falsely in all the respects alleged, but it is sufficient if you find that he knowingly falsely testified in any one of the respects alleged, that is, either that Seivers was not at said hotel in Spokane, Washington, between three and five o'clock on the afternoon or evening of October 14, 1928, or that he, Seivers, was not there at any time on that day, or that Shallas did not see Seivers during the afternoon of that day at said hotel or elsewhere in Spokane."

ROBERTSON & PAINE.
Attorneys for Defendant

[Endorsed]: Filed June 5, 1929. [70]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To the United States of America:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the District of Idaho, Northern Division, wherein the defendant in the above-entitled cause is appellant and you, as plaintiff in said cause, are appellee, to show cause, if any there be, why the judgment and sentence in said appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable CHARLES C. CAVANAH, United States District Judge, this 5th day of June, A. D. 1929.

CHARLES C. CAVANAH,
U. S. District Judge.

Attest: W. D. McREYNOLDS,
Clerk.

Copy of the above citation received this 5th day of June, 1929.

W. H. LANGROISE,
Asst. U. S. District Attorney.

[Endorsed]: Filed June 5, 1929. [71]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, George Shallas, as principal, and the Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto the United States of America in the full and just sum of Four Thousand ($4,000) Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns.

Sealed with our seals and dated this 5th day of June, 1929, A. D.

WHEREAS, lately at the May term, A. D. 1929, of the District Court of the United States, for the District of Idaho, Northern Division, in a suit pending in said court between the United States of America, plaintiff, and George Shallas, defendant, a judgment and sentence was rendered against the said George Shallas, and the said George Shallas has obtained an order allowing an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing said United States of America to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the date of the said citation, which said citation has been duly served;

Now, the conditions of the above obligation is such that if the said George Shallas shall appear, either in person or by [72] attorney, in the United States Circuit Court of Appeals, for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in said court, and shall prosecute his said appeal and abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States for the District of Idaho, Northern Division, at such day or days as may be appointed for retrial in said District Court, and abide by and obey all orders made by said court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

GEO. SHALLAS,
Principal.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By G. D. PERMAIN,
Atty.-in-fact.

[Seal] ABE KALEY,
General Agent,
Surety.

Bond approved this 5th day of June, 1929.

CHARLES C. CAVANAH,
U. S. District Judge.

Approved as to form.

W. H. LANGROISE,
Asst. U. S. District Attorney.

[Endorsed]: Filed June 5, 1929. [73]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled *Matter*:

Please make up and certify to the Circuit Court of Appeals Ninth (9th) Judicial Circuit the following papers and records in the above-entitled cause:

1. Indictment.
2. Verdict.
3. Judgment and sentence.
4. Petition for a new trial.
5. Amended petition for a new trial.
6. Order denying new trial.
7. Petition for appeal and order allowing same.
8. Citation on appeal.
9. Assignment of errors.
10. Motion for order extending time to file bill of exceptions and affidavit.
11. Order extending time in which to serve and file bill of exceptions.
12. Bill of exceptions.

13. Bond on appeal.
14. Order extending time to file and docket case in the Ninth (9th) Circuit.
15. Order further extending time to file and docket the case at San Francisco.
16. Praecipe for transcript of record.

ROBERTSON & PAINE,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 29, 1929. [74]

[Title of Court and Cause.]

ADDITIONAL PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please make up and certify to the Circuit Court of Appeals for the Ninth Judicial Circuit, the following papers and records in the above-entitled case:

1. Motion of plaintiff to strike proposed bill of exceptions.
2. Objections of plaintiff to the settling and allowing of defendant's proposed bill of exceptions.
3. Minute entry of the trial of the case of United States vs. George Shallas being case #2923 Northern, showing the trial of said case.
4. Certificate of the Clerk showing the day on which the May term of court for the Northern Division 1929 was adjourned and whether or not it was adjourned without day.

5. All other records, orders and other papers in the above-entitled case having to do with the filing and preparing of the bill of exceptions.
6. The affidavit of Dene Hickman filed in opposition to the motion for new trial.
7. Rule 76 of the Rules of Practice of the United States District Court for the District of Idaho.

W. H. LANGROISE,
Attorney for Plaintiff, United States of America.

[Endorsed]: Filed August 14, 1929. [75]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein by the appellant and praecipe filed by the appelle for additional parts of the record.

I further certify that the cost of the record herein amounts to the sum of $17.20, and that the same has been paid by the appellant.

WITNESS my hand and the seal of said court this 15th day of August, 1929.

[Seal] W. D. McREYNOLDS.

W. D. McREYNOLDS,

Clerk. [76]

[Endorsed]: No. 5918. United States Circuit Court of Appeals for the Ninth Circuit. George Shallas, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed August 17, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,

Deputy Clerk.

5518

In the United States

Circuit Court of Appeals

for the Ninth Circuit

GEORGE SHALLAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No.....

APPELLANT'S BRIEF

Upon appeal from the District Court of the United States, for the District of Idaho, Northern Division

ROBERTSON & PAINE,
402 Hyde Building,
Spokane, Washington.
Attorneys for Appellant.

Filed.....Clerk.

GREEN-BERRY-HUGHES PTG. CO., SPOKANE

In the United States

Circuit Court of Appeals

for the Ninth Circuit

GEORGE SHALLAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No.....

APPELLANT'S BRIEF

Upon appeal from the District Court of the United States, for the District of Idaho, Northern Division

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ROBERTSON & PAINE,
402 Hyde Building,
Spokane, Washington.
Attorneys for Appellant.

STATEMENT OF THE CASE

The defendant Shallas was charged and convicted of the crime of perjury. The circumstances surrounding the alleged perjured testimony were as follows:

The defendant Shallas operated the Ethlyn Hotel in Spokane, Washington. November 28, 1928, he was called and testified as a witness for the defense in a criminal case in which one Theodore Sievers was being tried in the District Court of Idaho for a violation of the National Prohibition Act. Sievers was charged with possessing and selling moonshine whiskey at Tensed, Idaho, on or about October 14, 1928;—Tensed, Idaho, being about sixty miles from Spokane, Washington. The defendant Shallas testified in the Sievers case as follows:

"Q Where do you reside? A. Spokane.

"Q What is your business?

"A Hotel business.

"Q What hotel are you operating?

"A The Ethlyn Hotel.

"Q Were you operating the Ethlyn Hotel during the month of October, 1928? A. Yes.

"Q Were you at the hotel on the 13th, 14th and 15th days of October, 1928? A I was.

"Q Did you see Mr. and Mrs. Sievers there at your hotel on the thirteenth? A I did.

"Q Did you see them there on the 14th?

"A I did.

"Q And what part of the day do you recall seeing them on Sunday, the 14th?

"A About nine—between nine and ten o'clock they went out, and Mr. Sievers told me—

"Q That would be hearsay?

"A I seen them in the morning.

"Q And again in the afternoon? A Yes.

"Q How many times do you recall—approximately how many times do you recall?

"A A couple of times in the afternoon.

"Q Did they stay at the hotel Sunday night?

"A They did.

"Q Do you remember their checking out there Monday?

"A The fifteenth, yes.

"Q Who, if anybody, did the checking out —who did they pay there? A Personally to me.

"Q Mr. Sievers did? A. Yes.

"Q Calling your attention to October 14th, you say you saw the defendant Theodore Sievers at your hotel? A. Yes.

"Q About what time did you first see him there on that day?

"A I seen him in the morning once, around nine-thirty or ten.

"Q When did you next see him?

"A In the afternoon.

"Q What time?

"A A couple of times between three and five.

"Q You saw him twice between three and five?

"A Yes." (Tr. 4-5.)

This testimony the indictment alleged to be false in the following language:

> "Whereas, in truth and in fact, as he, the said George Shawle, alias George Shallas, then and there well knew, the said Theodore Seivers was not at the Ethlyn Hotel in the city of Spokane, State of Washington during the afternoon and evening of October 14, 1928, during the time or times that the said George Shawle, alias George Shallas testified that the said Theodore Seivers was there, or at any other time on that day and that the said George Shawle, alias George Shallas, did not see the said Theodore Seivers during the afternoon of October 14, 1928, in the Ethlyn Hotel or any other place in the city of Spokane, State of Washington, whereby he, the said George Shawle, alias George Shallas did, then and there, as aforesaid, knowingly, wilfully, unlawfully, corruptly, falsely and feloniously swear and did feloniously commit perjury."

The Government's case, in addition to the testimony relative to the fact that Shallas was duly sworn and had actually testified as alleged in the indictment, which is not disputed, consisted of the testimony of Sievers who testified that after his liquor trial, which resulted in a hung jury, he was arrested on a perjury charge. That charges were likewise placed against his wife and mother-in-law;

that he had pled guilty to both the liquor and perjury charges, but that the charges had not been pressed against his wife and mother-in-law.

He further testified that he was at the Ethlyn Hotel the night of October 13, 1928, but left the morning of October 14th, without seeing the defendant Shallas, and did not again return to the hotel on that date, but left Spokane around one o'clock (Tr. 29), and arrived in Tensed, Idaho, between 4:30 and 5:30 P. M. and sold the liquor to Suzanne Lawrence at Tensed, as charged in the information against him, in the early evening of October 14th. He stated further that after his arrest he went to Shallas and explained the situation to him and Shallas agreed to testify that he was in Spokane on October 13th, 14th and 15th, and that he, Shallas, made an alteration in his hotel register so that it would not appear that the room that Sievers occupied on October 13th had been re-rented to another party on the 14th, but would show it re-rented instead on October 15th.

Then several witnesses who lived in Tensed were called to testify that they saw Sievers in Tensed on October 14th, during the afternoon and evening. (Their testimony will be discussed more at length in the argument.) And the testimony of N. D. Wernette, the attorney who defended Sievers at his trial, that Sievers had brought him some sort of a receipt showing that he had paid his bill at the Ethlyn Hotel in October, but that he did not know where it was now.

The defendant moved for a directed verdict at the close of the Government's case. (Tr. 43).

The defendant testified in his own behalf and denied changing the register sheet or committing the perjury. Said he saw Sievers in the morning of October 14th at the Ethlyn Hotel and saw him again there in the afternoon, sometime after lunch, he couldn't say the exact hour, (Tr. 47), it might have been a little after three. (Tr. 48). And the testimony of Sievers' sister-in-law that she was with him until 1:30 or 1:45 P. M. on October 14th. (Tr. 45).

The defendant again moved for a directed verdict at the close of all the evidence, which was denied and exception allowed. (Tr. 69). A verdict of guilty was returned and sentence of $1,000 and eighteen months in McNeil's Island imposed. Motion for new trial was filed and argued and taken under advisement by Judge Cavanah, written briefs submitted, and the petition denied on July 11, 1929.

SPECIFICATIONS OF ERRORS.

I.

The court erred in denying the motion for a directed verdict at the close of the Government's case and at the close of all the testimony. (Assignments of Error 1 and 2).

II.

The Court erred in refusing to give defendant's requested instruction No. 2 as follows:

"You are instructed that the defendant is charged with falsely testifying in a criminal proceeding in this court in substance and effect that he saw one Theodore Sievers at the Ethlyn Hotel at Spokane, Washington, on the 14th day of October, 1928. The Government has alleged that such testimony was false and that the said George Shallas did not see the said Theodore Sievers in Spokane, Washington, during the afternoon and evening of October 14th, 1928, or at any other time on that date.

"I instruct you that the burden of proof is on the Government to prove the alleged false statement beyond a reasonable doubt. You cannot find the defendant guilty unless you believe beyond a reasonable doubt that the defendant, George Shallas, never saw the said Theodore Sievers in Spokane, Washington, on October 14, 1928."

and in instructing the jury as follows:

"You are instructed that to find the defendant guilty it is not necessary that you find he knowingly testified falsely in all the respects alleged, that is, either that Sievers was not at said hotel in Spokane, Washington, between three and five o'clock on the afternoon or evening of October 14, 1928."

and in re-instructing them as follows:

"I think I said to you and I will say to you again that the falsity of that testimony—any part of it alleged in this indictment—is alleged to be in that Shallas knew that Sievers was not at the Ethlyn Hotel in Spokane, Washington. during the afternoon and evening of October 14th, 1928, between three and five o'clock of that afternoon, or any other time on that day, and that Shallas did not see Sievers during the

afternoon of October 14, 1928, in said hotel, or elsewhere in Spokane, Washington. That is the charge of falsity made in this indictment. I say to you again that if you find—to find the defendant guilty it is not necessary that he knowingly testified falsely in all the respects charged, but it is sufficient if you find that he knowingly falsely testified in any one of the respects alleged, that is, either that Sievers was not at said hotel in Spokane, Washington, between three and five o'clock on the afternoon or evening of October 14, 1928. In other words, the falsity charged in this indictment is that Sievers was not at the hotel at between the hours of three and five on the afternoon of October 14, 1928, or the evening of October 14th, 1928."

(Assignments of Error 3, 4 and 5.)

ARGUMENT AND AUTHORITIES.

The motions for a directed verdict should have been granted on two grounds:

(1) Because under the indictment the Government was bound to prove that Sievers was not at the Ethlyn Hotel at all on October 14, 1928, and George Shallas did not see him at the Ethlyn Hotel or any other place in the City of Spokane during the afternoon of October 14, 1928, and the Government wholly failed in these respects.

(2) Because even under the Government's theory of the case, the evidence of Shallas' guilt rested solely on the uncorroborated testimony of Sievers.

(Specification of Error I.)

To clearly understand the question involved it is necessary to examine the indictment in this case closely. After the formal matters and the allegations of when and where Shallas was sworn, etc., the indictment says that he "did give the answers as hereinafter set forth in response to the questions hereinafter set forth, to-wit:" (Tr. 4). Then follows a series of questions and answers, many of which are obviously true, and then the indictment points out wherein the answers were false and wherein the defendant committed perjury in the following language:

> "Whereas, in truth and in fact, as he, the said George Shawle, alias George Shallas, then and there well knew, the said Theodore Seivers was not at the Ethlyn Hotel in the City of Spokane, State of Washington, during the afternoon and evening of October 14, 1928, during the time or times that the said George Shawle, alias George Shallas testified that the said Theodore Seivers was there, or at any other time on that day and that the said George Shawle, alias George Shallas, did not see the said Theodore Seivers during the afternoon of October 14, 1928, in the Ethlyn Hotel or any other place in the city of Spokane, State of Washington, whereby he, the said George Shawle, alias George Shallas did, then and there, as aforesaid, knowingly, wilfully, unlawfully, corruptly, falsely and feloniously swear and did feloniously commit perjury."

This alleges the truth that (1) Theodore Sievers was not at the Ethlyn Hotel in Spokane, Washington, at any time on October 14, 1928, and (2) that George Shallas did not see him at any place in Spo-

kane on October 14, 1928. That being the truth, according to the allegations of the indictment, then of course any testimony given by Shallas that Sievers was at the Ethlyn Hotel any time on October 14, 1928, or that he saw him at any place in Spokane on that date, was false.

An indictment for perjury must set up definitely wherein the defendant has testified falsely.

Hilliard v. U. S. 24 Fed. (2d), 99.

And it must also allege the truth in regard to the fact.

U. S. v. Pettus, 84 Fed. 791.

Bartlett v. U. S. 106 Fed. 884. (C. C. A. 9).

And it must follow that the Government having alleged what the truth is must be bound by its allegations. And while the rule is well established that the indictment may contain more than one specification of falsity and the Government is only bound to prove one, that is not the situation here.

The indictment might have been drawn to specifically traverse the truthfulness of each separate answer given by Shallas and the proof that one was false would have been sufficient, but that was not done. Instead the questions and answers were set out verbatim, followed by a general allegation of what the truth was upon which the defendant, the court and jury were to deduct which answers were false because in conflict with the truth as alleged. And the truth is alleged to be not merely that Siev-

ers was not in the Ethlyn Hotel at the specific times Shallas testified he saw him, but that he was not there then or at any other time on that day, which is equivalent to saying that he was not there at all on that day.

The Government having elected to place its charge of falsity on such broad grounds is bound by it.

The Government's contention, as we understood it at the trial, was that the phrase "or at any other time on that day" was merely an additional ground of falsity which the Government need not prove it if did not wish to. This construction we respectfully submit will not bear analysis. The allegation is not one taken by itself the proof of which would be sufficient to sustain a conviction. Suppose the Government had proved that Theodore Sievers was not in the Ethlyn Hotel "at any other time (that is, other than the times testified to by Shallas) on that day," they still would not have proved that Shallas in any way testified falsely.

The phrase can have but one meaning, but one purpose, namely, to charge that the defendant Shallas testified falsely when he testified that Sievers was in the Ethlyn Hotel on October 14th, because he knew the truth to be that Sievers wasn't in said Hotel at any time on said date. In practical effect the Government said to Shallas, by this indictment, it is immaterial whether Sievers was in the Ethlyn Hotel on October 14th at the exact hours you testi-

fied to, because he was not there at all on that date, as you, George Shallas, well knew.

In this connection we wish to call the Court's attention to a similar phrase in the last portion of this part of the indictment; in line 9, page 6 of the transcript, a coordinate clause commences with the conjunctive "and". This clause states the truth to be that "George Shallas did not see the said Theodore Sievers during the afternoon of October 14, 1928, in the Ethlyn Hotel, *or any other place in the City of Spokane, State of Washington.*"

The phrase in italics is used here in exactly the same way it is used in the preceding clause, except that it refers to place instead of time. It casts the same burden upon the Government, namely, to prove the truth to be that Shallas did not see Sievers at any place in Spokane on the afternoon of October 14, 1928. In other words, the Government concedes by this language that the material fact was whether Shallas saw Sievers in Spokane on the afternoon of October 14th, at any place, and not whether he saw him in the Ethlyn Hotel, or the Davenport Hotel. So in the preceding one, the Government concedes by the language of its indictment, that the material issue is, was Sievers at the Ethlyn Hotel on October 14, 1928, and not was he there exactly between 3:00 and 5:00 P. M., or 9:30 in the morning.

The purpose of the indictment is to inform the defendant of what he is charged and the issue he will have to meet, and we respectfully submit that

this indictment informed Shallas that the issue was that he testified falsely to having seen Sievers in Spokane on October 14th, because Sievers was not there at all on that date. There is no argument that if this contention is right the motion for a directed verdict should have been granted, because the Government's own testimony shows that Sievers was at the Ethlyn Hotel on the morning of October 14, 1928, and was in Spokane until 1:00 or 1:30 P. M. on that date.

The motions for a Directed verdict should have been granted because the evidence of the defendant's guilt rested on the uncorroborated testimony of Sievers.

The trial court refused to construe the indictment as contended for by the defendant, but submitted the case to the jury on the Government's theory, namely: that Shallas committed perjury when he testified that he saw Sievers in Spokane, Washington, at the Ethlyn Totel, on October 14, 1928, in the morning about nine o'clock and twice in the afternoon between three and five.

The testimony discloses that Sievers was at the Ethlyn Hotel and around the hotel in the morning of October 14th, and while he said he did not see Shallas, he also said "maybe he seen me." (Tr. 33). So that the sole issue was whether Shallas saw Sievers at the hotel in the afternoon of October 14th; Shallas says he did, Sievers says he did not, that he did not go back to the hotel.

Now the rule has been recently and definitely settled by the Supreme Court in Hammer v. U. S. 261, U. S. 620, 70 L. Ed. 1118, that the uncorroborated testimony of a witness in a perjury case is not sufficient evidence upon which to sustain a conviction. In that case the court said:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."

Obviously, such corroboration must be corroboration of the material part of the witness' testimony. Of course a witness can testify to many immaterial and true occurrences and the Government can bring other witnesses to corroborate on these facts, but such corroboration is not within the meaning of the language of the Supreme Court, it does not extend to the facts in dispute.

With this principle in mind, let us examine the testimony in this case a little more closely.

Shallas was accused of having committed perjury in testifying he saw Sievers twice between three and five P. M. at the Ethlyn Hotel on October 14th. Sievers said he was in Spokane until about 1:30 P. M. on that date, but that he did not go back to the hotel after lunch, that he left Spokane about 1:30 and drove to Tensed a distance of about sixty miles, arriving there between 4:30 and 5:30 P. M., (Tr. 29), after having stopped on the way at Spangle. (Tr. 34).

The defendant does not dispute that Sievers was in Tensed in the late afternoon and evening of October 14th. He could have been there and arrived at the time he testified he did, between 4:30 and 5:30 P. M., and still have been seen by Shallas at the Ethlyn Hotel around three o'clock. The issue then further narrows itself down to the question what corroboration is there of Sievers when he says he left Spokane at 1:30 P. M. without returning to the Ethlyn Hotel. We respectfully submit an analysis of the record will disclose none whatever.

The Government, in an attempt to supply the needed corroboration, called a number of witnesses from Tensed, men who had all been present at a Sunday afternoon farewell dinner. Manifestly their testimony only went to prove that Sievers was back in Tensed on the afternoon of October 14th. They did not know or pretend to know what he did or whom he saw while in Spokane, or what time he left Spokane, save inferentially from their knowledge of when they saw him in Tensed. But Sievers himself has fixed that time for us between 4:30 and 5:30 P. M., a time not inconsistent with Shallas' statement. And, with one exception, the witnesses from Tensed do not place the arrival of Sievers in Tensed at a time which would make his necessary departure from Spokane prior to the time Shallas said he saw him. Mr. Shaw saw his car there between four and five o'clock. (Tr. 35 and 36). Mr. Weiss saw him there three or four times during the afternoon and gave no times at all. (Tr. 37 and

38). Mr. McNeil saw him some time after dinner, how long he doesn't know. (Tr. 41). Mr. Hart saw him in the afternoon and evening, but stated no hour at all. (Tr. 41 and 42).

The one exception was old Mr. Phillips, who after seven months remembered he saw them right around one o'clock. (Tr. 39). This is so palpably contradictory of Sievers' own testimony and the testimony of Mr. Mack and Miss Ohler, (Tr. 43 and 44), as to be plainly the honest mistake of an old man carried away with the excitement of the trial. Even the Government can make no contention that Sievers was back in Tensed at 1:00 P. M., without admitting that Sievers testimony is again as full of perjury, as he confessed it was in his first trial.

The other evidence upon which the Government relied for corroboration was the fact that Sievers testified that the hotel register of the Ethlyn Hotel was changed by Shallas to show that the Sieverses did not check out of the hotel on October 14th, and that there is apparently such a change on the register sheet. (Pl. Exhibit No. 3).

The fact in this regard are these: The register shows that Mrs. Sievers registered for room 36 at the Ethlyn Hotel on October 13th; that farther down on the sheet some one else has registered and been assigned room 36,—as the register now shows, on the 15th. Sievers' contention was that this second registration was originally for the 14th, and that Shallas erased the 4 and wrote in a 5.

Now the testimony in regard to what was done with the register sheet is this: Sievers says that after Shallas changed it he gave it to him, some two weeks after the liquor deal, that he had it in his possession for several hours and brought it up and gave it to Mr. Wernette, (Tr. 33), the lawyer who defended him in the first trial. Mr. Wernette kept it in his custody until the trial of the liquor case against Sievers, when it was introduced in evidence. Shallas identified it at that time as the register sheet of his hotel, but not one word was said to him or by him in regard to the second registration, nor any mention made of it in the liquor trial at all.

Conceding, for argument's sake, that if Shallas had retained the custody of his register and had brought it to the trial and offered it in evidence, that proof of the changes would have been sufficient corroboration of Sievers:—that is not the case here.

Here, several weeks before the trial, Sievers, the man who is sought to be corroborated, takes the register from Shallas, has it in his exclusive possession for several hours, gives it to his attorney, and Shallas never sees it again until he is permitted a cursory glance at it during Sievers' trial. Suppose Sievers makes whatever changes he desires on the register sheet, while he has possession of it, and then testifies someone else made the alterations, does the mere fact that the alterations are there corroborate him that someone else made them?

To hold so, is to sanction the too often tried logic

of the small boy who has broken the cellar window and in seeking to place the blame elsewhere proudly announces "Joe broke the window, and there's the broken window to prove it."

There are, of course, plenty of cases which hold that documentary evidence may take the place of another witness to furnish the necessary corroboration, but we know of none that hold such documents may be ones which the witness himself may have prepared.

Underhill's Criminal Evidence, 3d Edition, p. 917, sec. 682, states the rule as follows:

> "The written or oral admission of the accused, *or documentary evidence found in his possession or in the possession of those who may be criminally associated with him*, may be received as corroborative, and then if believed by the jury, will be equivalent to another witness." (Italic ours.)

Here the documentary evidence was not found in defendant's possession, but was admittedly for a considerable time in sole possession of the witness Sievers.

The Supreme Court has also passed on this question, and in U. S. v. Woods, 14 Pet. (U. S.) 430, 10 L. Ed. 527, says:

> "In what cases, then, will the rule not apply? Or in what cases may a living witness to the *corpus delicti* of a defendant be dispensed with, and documentary or written testimony be

> relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it."

Here again it is at once apparent that the documentary evidence must spring from the accused and it can not be a document which the accusing witness had both the motive and the opportunity to prepare.

We respectfully submit therefore that the testimony of Sievers is wholly uncorroborated by any other witness or document and the motions should have been granted.

The Court erred in Instructing the Jury.

(Assignment of Error 2).

The same question is involved here as was argued in the first part of the argument on the motions for a directed verdict, namely: that the issue was whether or not Shallas saw Sievers in Spokane at all on October 14th, or not.

It is not necessary to repeat here the arguments already advanced that the issue involved was whether Shallas saw Sievers in Spokane at all on October 14th, and not merely whether he saw him between three and five P. M. That being the issue, it is our contention the court should have either granted the motion for a directed verdict or if he thought there was some doubt on that issue, should have submitted it to the jury with a proper instruction as requested; and that it was error to tell the jury that if they believe that Shallas did not see Sievers between three and five P. M. that they could find him guilty.

The appellee's motion to strike the Bill of Exceptions is without merit.

The appellee has had included in the transcript a motion to strike the bill of exceptions herein upon the grounds that it was not settled in time. The facts are that a motion for a new trial was presented on June 5, 1929, and orally argued before Judge Cavanah. The Judge was unable to decide the motion and took it under advisement and called for written briefs, which were submitted. On July 17, 1929, the Judge rendered a memorandum opinion and at the same time prepared and signed an order denying the petition for a new trial (Tr. 17.). Therafter the appellant applied for, and the Judge signed an order extending the time in which to serve, file and settle the bill of exceptions, and they were so settled within the time as allowed. The Government objects because they were not served

within the time as specified in Rule 76 of the District Court. However, the local rules are discretionary and not jurisdictional, and this court, in the case of Spokane Interstate Fair v. Fidelity & Deposit Company of Maryland, 15 Fed. (2nd) 48, held the trial court had the power to extend the time to present a bill of exceptions beyond that allowed by a general rule of court.

The further suggestion is made that the term of court had been adjourned on June 19, 1929, but at this time the court still had under advisement the petition for a new trial and the authorities are agreed that the time in which to serve the bill of exceptions does not begin to run until the motion for a new trial is passed upon.

Texas & Pac. Ry. vs. Murphy, 111 U. S. 488, 4 Sp. Ct. 497; 28 L. Ed. 492;

U. S. Ship B. E. F. Corp. v. Galveston Dry Dock Co., 13 Fed. (2d) 607.

The bill of exceptions was signed at the same term the motion for a new trial was overruled, and was therefore in time.

We respectfully submit, therefore, that the judgment herein was erroneous and should be reversed.

Respectfully submitted,

ROBERTSON & PAINE,
Attorneys for Appellant.

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CASES AND AUTHORITIES

No. 5518

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE SHALLAS,
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vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

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H. E. RAY,
United States Attorney

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SAM. S. GRIFFIN,
Assistant U. S. Attorneys.
Attorneys for Appellee.

Filed.....1929

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SUBJECT INDEX

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STATEMENT OF THE CASE

On the 29th day of May, 1929, an indictment was returned against the appellant George Shallas by the Grand Jury charging him with the crime of perjury.

George Shallas was tried and convicted by a jury on the 4th day of June, 1929 (Tr. p. 18). On the

5th day of June 1929, appellant was sentenced by the court to pay a fine of one thousand dollars and be confined at McNeil Island for a term of 18 months (Tr. p. 18 and 19).

A petition for a new trial was filed on the 5th day of June 1929. (Tr. p. 10 and 11), and an amended petition for a new trial was filed on the 28th day of June 1929. (Tr. p. 17).

On the 11th day of July 1929, at Boise, Idaho, the court entered an order denying the petition for a new trial, (Tr. p. 17).

On June 19, 1929, the May term of court for 1929, Northern Division, District of Idaho was adjourned without day (Tr. p. 70 and 71).

On the 27th day of July, 1929, the appellant made application for an order extending the time in which to prepare and file a bill of exceptions (Tr. p. 7, 8, and 9) and on the 27th day of July 1929, an order extending the time to file the bill of exceptions was signed by the Federal District Judge (Tr. p. 9).

Objections to the settling and allowing of the proposed bill of exceptions was filed by appellee (Tr. p. 19 and 20) which objections were denied and an exception allowed (Tr. p. 20).

The Bill of exceptions was lodged August 5, 1929, and settled and allowed August 14, 1929, (Tr. p. 66).

The case is here on appeal.

FACTS

We will not take the time of the court to detail the appellee's proof with respect to the jurisdiction of the court in the case of U. S. vs. Theodore Sievers, being case number 2828, the taking of the oath by Shallas, the materiality of the testimony given by Shallas in that case or of the testimony actually given in that case by this appellant for as we read appellants brief no question is raised with respect to these matters but only as to the sufficiency of appellee's proof of the falsity of such testimony.

Theodore Seivers was called as a witness and testified in substance that he was the Theodore Seivers who had been theretofore charged with the possession and sale of moonshine whiskey at Tensed, on the 14th day of October, 1928, and had been tried in November 1928 at Coeur d' Alene, Idaho, and had thereafter and during the May term of court 1929 at Coeur d' Alene entered a plea of guilty to said information and had been indicted by the Grand Jury for perjury in case No. 2917, in connection with his testimony in the liquor case and had entered a plea of guilty to that (Tr. p. 24). He further testified that he was arrested the latter part of October, on the liquor charge and about a week after the preliminary hearing at Plummer, Idaho, he had seen and talked with the appellant at Spokane. That he at that time explained to George Shallas that he wanted to prove that he was not in Tensed on Sunday, October 14th, 1928, the day that he sold the

whiskey, and that he explained to Shallas that he had sold the whiskey and did not think that any body had seen him (Tr. p. 24 and 25). That Shallas then asked him whether or not he was sure that nobody had seen him and that Shallas then said "We will fix the register up so that we can show that you were here on the 13th and 14th and did not check out until the 15th." (Tr. p. 25). That Shellas then went and got a pencil and erased the "14" (Tr. p. 25) upon plaintiff's Exhibit 3, the register sheet referred to and which shows Mrs. Theodore Seivers had registered. (Tr. p. 25). The register sheet shown as plaintiff's Exhibit 3 and changed by Shallas shows room No. 36 as the room occupied by Theodore Seivers; the entry which was changed is "A. J. Logi, Seattle, Room 36, 10/15." the "4" was erased and a "5" made over it. After the erasure George Shallas put a little dirt on it so it would not be noticed (Tr. p. 27).

"George Shallas also gave me a little piece of paper showing where I had given him $3.50 for the room rent for the 13th and 14th." Theodore Seivers testified that he gave the receipt to Mr. Wernette and has not seen it since then (Tr. p. 27). That he and his wife did not stay at the Ethelyn Hotel on the night of Sunday, October 14th, 1928; that he did not see George Shallas, this defendant, at any time during the day of October 14th, 1928 (Tr. p. 27). That he was in Spokane the afternoon and

night of Saturday, October 13th and that his wife was with him and that they stayed at the Ethelyn Hotel (Tr. p. 27 and 28). That on Sunday the 14th they got up between seven and eight o'clock. That he went out to get the car while his wife dressed and then went up and got her and they left and went over to St. Lukes Hospital to get his sister-in-law, Ruby Ohler (Tr. p. 28). That they drove around for a while and then went down to the Christian Science Church which let out about 12 o'clock and after that they parked down town a little while and had their dinner and that they then dropped the sister-in-law, Ruby Ohler off at her home (Tr. p. 28). That he did not see George Shallas the morning of October 14th, (Tr. p. 28). That he was in Tensed the late afternoon and evening of October 14, 1928, and that his wife Laura Seivers remained in Tensed, that night. That he sold a pint of whiskey to Suzanne Lawrence during the early part of the evening as charged in the information in case No. 2828, (Tr. p. 29). That he arrived in Tensed on October 14th, 1928, between 4:30 and 5 o'clock as best he remembered and was there all the rest of that day and night until the next morning (Tr. p. 29), and that he left Spokane around one o'clock, (October 14, 1928) (Tr. p. 29).

That the receipt was given to him by George Shallas several day before the trial (referring to case No. 2828, the liquor case that was tried in

November 1928), and some time after the 15th of October, and that he did not pay the appellant at the Ethelyn Hotel the amount shown on the receipt (Tr. pp. 30, 31). That he was 26 years old and had not been sentenced on the charges of selling liquor and perjury. (Tr. p. 31). That his wife and mother-in-law were bound over for perjury committed in this same transaction (Tr. p. 31). That he never had any understanding with respect to the charges being dropped against his wife and mother-in-law with anybody (Tr. p. 32). That he first saw the hotel register in George Shallas' room about two weeks after this liquor deal and that George Shallas gave it to him to take to Mr. Wernette and that he had it in his possession for several hours, only long enough to go from Spokane to Coeur d' Alene, (Tr. pp. 33 and 34). That he never had it in his possession after that, (Tr. p. 34).

W. D. McReynolds, the clerk of the District Court for the District of Idaho, testified that plaintiff's Exhibit, number 3, is the same exhibit that was offered as defendant's exhibit, number 2, in the case of United States vs. Theodore Seivers, (the liquor case) (Tr. p. 25), and that George Shallas was a witness in that case and identified the register as the original record of his hotel. (Tr. p. 26). That he had the register in his custody until a day or two before he (W. D. McReynolds) testified; that he had given it to the District Attorney and that it was

kept in the files of the court and he could not testify whether it was in the same condition now as then (Tr. p. 26). That he did not recall of any reference being made at the trial in November to the fact that room 36 was registered for by another person on the 15th, (Tr. p. 26).

W. H. Langroise was called as a witness and testified that he got plaintiff's Exhibit number 3 from Mr. McReynolds and that it had been in his possession at all times since then and that it was in the same condition as when he got it from Mr. McReynolds, (Tr. p. 26).

N. D. Wernette was called as a witness and testified that he was an attorney at Coeur d' Alene and represented Theodore Seivers in Case number 2828, and that either Mr. Seivers or Mrs. Seivers gave him a piece of paper purporting to be a receipt from the Ethelyn Hotel signed by George Shallas some time prior to the trial of Case number 2828, and shortly after Seiver's arrest; that he has been unable to locate the same and that it was never introduced at the time of the trial, (Tr. p. 30).

The testimony of the witnesses from Tensed, and the testimony of the defense which except that of the appellant Shallas is not at all contradictory to the testimony of the government will be discussed in the argument itself.

BRIEF OF ARGUMENT

This court is precluded from considering this bill of exceptions as a part of the record in this case.

Rule 76 District Court Rule for District of Idaho.

Anderson vs. U. S. 269 Fed. 65.

Michigan Insurance Bank vs. Eldred, 143 U. S. 293.

O'Connell vs. U. S., 253 U. S. 142.

Great Northern Life Insurance Company vs. Dixon, 22 Fed. (2nd) 655.

Spokane Interstate Fair Association vs. Fidelity and Deposit Company of Maryland. 15 Fed. (2) 48.

A bill of exceptions settled and allowed by a court without jurisdiction will not be considered on appeal.

Michigan Insurance Bank vs. Eldred, supra.

G. N. Life Insurance Company vs. Dixon, supra.

Appellants motion for a directed verdict was properly denied.

Evidence sufficient to sustain the verdict.

U. S. vs. Woods, 39 U. S. 428.

Hammer vs. U. S., 271 U. S. 620.

Underhill's Criminal Evidence 3rd edition, page 917, Sec. 682.

Holy vs. U. S., 278 Fed. 521.

Gordon vs. U. S., 5 Fed. (2) 943.

Hashagen vs. U. S., 169 Fed. 399.

A conviction of perjury may be sustained upon the

testimony of a single witness if the testimony of the defendant is unsatisfactory and contradictory.

Vedin vs. U. S. 257 Fed. 550.

State vs. Miller, 24 W. Va. 802.

ARGUMENT

THIS COURT IS PRECLUDED FROM CONSIDERING THE BILL OF EXCEPTIONS AS A PART OF THE RECORD IN THIS CASE.

Rule 76 of the District Court for the District of Idaho, provides the different ways in which a bill of exceptions to any ruling may be reduced to writing and settled. They are as follows, (1) may be reduced to writing and settled and signed by the judge at the time the ruling is made, (2) or at any time during the trial if the ruling was made during the trial, (3) or within such time as the court or judge may allow by order made at the time of the ruling or if the ruling was during the trial, any time during the trial,—and if not settled and signed as above provided, then (4) it may be settled and signed if the party desiring the bill of exceptions shall within 10 day after the ruling is made or if the ruling was made during the trial, within 10 days after the rendition of the verdict serve upon the adverse party a draft of the proposed bill of exceptions. Tr. pp. 74, 75 and 76)

Rule 76 which has been sub-divided into four parts by us for the purpose of argument is the only rule

of the District Court for the District of Idaho, having to do with the settling and allowing of the bill of exceptions.

An examination of the record discloses that the application for an order extending the time in which to prepare and file a bill of exceptions was not filed and the order itself was not secured until nearly two months after the rendition of the verdict in this case, and over a month after the 1929 May term of court for the Northern Division of the District of Idaho, had adjourned sine die.

Appellant in his brief assumes that the motion for a new trial stays the running of the time for preparation and filing of the bill of exceptions. We do not believe this to be the law. It is true that the 5th Circuit Court of Appeals in the case of U. S. Shipping Board vs. Galveston Dry Dock, etc., 13 Fed. (2) 607, held that the motion for new trial would stay the running of the time for signing a bill of exceptions until the court had acted on the motion, but in support of its position it cites Texas & Pacific R. R. Co. vs. Murphy 111 U. S. 488, which as we read it does not support the contention at all. The Supreme Court decision holds that it does stay the time for the suing out a writ of error or in other words the time in which an appeal may be taken. But the time in which an appeal may be taken and the preparation of a bill of exceptions are not the same. An appeal may be taken on the record and

no bill of exceptions be a part of that record. Under the rules of the Idaho district, ten days from the time of the rendition of the verdict without further extensions is all the time that one may have for the preparation, serving and filing of the bill of exceptions, while one has 90 days in which to take an appeal. For the purpose of argument, assuming that the appellant's motion for a new trial did stay the time in which the bill of exceptions might be prepared, served and filed, until the motion was acted upon by the court, it is our position, that appellant's bill of exception was still too late.

Appellant in his brief on page 20, has inadvertently stated that the judge rendered a memorandum opinion and signed an order denying the petition for a new trial on July 17, 1929, when as a matter of fact the record discloses that the memorandum opinion and order denying petition for new trial was made on July 11, 1929, (Tr. p. 17), and the application for an order extending time in which to prepare, file and serve a bill of exceptions was not made until the 27th day of July, 1929, (Tr. pp. 7, 8, and 9), and the order extending the time to file the bill of exceptions was not made until the 27th day of July, 1929, (Tr. p. 9).

In other words, the bill of exceptions was neither served or filed within 10 days of the time of the denying of the petition for a new trial nor was there any order extending the time in which to prepare,

serve and file a bill of exceptions within the 10-day period, but rather such order was secured some sixteen days after the order denying the petition for new trial.

The trial court was without jurisdiction to make any order extending the time or to settle or allow a bill of exceptions on July 27, 1929, for the reason that it was not within ten days of the time of the rendition of the verdict or the denial of the petition for a new trial, and not during the same term at which the case was tried and the verdict rendered by the jury.

This court passed upon this question in the case of Anderson vs. U. S. 269 Fed. 65, at page 79.

> "As to all of the plaintiffs in error except Fox, we think it clear that we are precluded from considering the bill of exceptions as a part of the record, for the reason that the term of the court during which both the verdict and judgment against them were rendered had expired prior to the signing of either of the orders undertaking to extend the time for the preparation, service, or settling of such bill. In support of this conclusion we need to do no more than refer to the very recent decision of the Supreme Court in O'Connell et al vs. U. S., 253 U. S. 142"

The Supreme Court of the United States in discussing the jurisdiction of a court to allow a bill of exceptions or amend a bill of exceptions laid down the following rule:

> "After the term has expired without the courts control over the case being reserved by

> standing rule or special order and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed is at an end."
>
> Michigan Insurance Bank vs. Eldred, 143 U. S., 293 at page 298.

And again we find the Supreme Court of the United States at a later date using the following language after quoting from its decision in Michigan Insurance Case vs. Eldred:

> "We think the power of the trial court over the cause expired not later than the 15th of December 1917, and any proceedings concerning settlement of a bill thereafter were *coram non judice*. We may not therefore consider the bill copied in the record".
>
> O'Connell vs. U. S. 253 U. S. 142 at page 147.

The rule with respect to the settling and signing of bill of Exceptions in the 8th Circuit is laid down in the case of Great Northern Life Insurance Company vs. Dixon, 22 Fed. (2nd) 655 at 657:

> "The rules which condition the settling and signing of a bill of exceptions are well established. The court has jurisdiction to settle and sign a bill of exceptions during the judgment term and any valid extension thereof. The extension of the term may be made (1) by standing order; or (2) by special order made during the judgment term or a valid extension thereof. At the end of the judgment term and any valid extension thereof, the court loses jurisdiction to settle and sign a bill of exceptions".

This court again considered when a bill of exceptions may be settled and allowed in the case of Spokane Interstate Fair Association vs. Fidelity and Deposit Company of Maryland, 15 Fed. (2) 48. In this case, however, the question as to the jurisdiction of the court could not be raised for the extension was granted by the court within the time given by the rules of the court in which a bill of exemption may be prepared, but we cite this case for the reason that it does in principle, re-affirm the necessity of the jurisdiction of the court at the time the order is made.

> "That being true and the court still *having jurisdiction to grant such extensions* when the orders were made, neither motion is thought to be well taken and both are therefor denied." (Italics ours).

The rule laid down in the cases above cited require that in this case for the court to have had jurisdiction to make an order extending the time in which to prepare, file and settle a bill of exceptions such order must have been made within the time allowed by rule 76; that is by June 14, 1929, or if the petition for new trial did stay the time, then not later than July 21, 1929, and if the order was made at a time after these dates and after the term had been adjourned sine die and after the 10-day period had elapsed, the court had no jurisdiction in which to make the order and was likewise without power or

jurisdiction to settle or allow any bill of exceptions in conformity with said order,

A BILL OF EXCEPTIONS SETTLED AND ALLOWED BY A COURT WITHOUT JURISDICTION WILL NOT BE CONSIDERED ON APPEAL.

> "By the uniform course of decisions no exceptions to rules at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties, and, save under very extraordinary circumstances, they must be allowed by the judge and filed by the clerk during the same term."
>
> Michigan Ins. Bank vs. Eldred,—supra.
>
> "It follows that the settling and signing of the bill of exceptions was *coram non judice*, and, though it is returned here, it cannot be considered as a part of the record."
>
> G. N. Life Ins. Co. vs. Dixon, supra.

The specifications of error in this case are all predicated and dependent upon appellant's bill of exceptions, and if said bill of exceptions as we contend, is not before this court, then there is nothing more to consider with respect to this appeal.

APPELLANTS MOTION FOR A DIRECTED VERDICT WAS PROPERLY DENIED.

Under the indictment in this case the government was not bound to prove that Seivers was not at the Ethelyn Hotel at all on October 14, 1928, but rather all that the government need prove under the indictment was that Seivers was not at the Ethelyn Hotel, Spokane, Washington, at the time or times on the afternoon of October 14, 1928, that Shallas testified that he was, and that Shallas did not see him there at those times.

The questions and answers set up in the indictment as testified by appellant in the liquor case which refer to the 14th of October, 1928, and the afternoon and evening of that day, are as follows:

"Q. Calling your attention to October 14th, you say you saw the defendant, Theodore Seivers at your hotel?

A. Yes.

Q. About what time did you first see him there on that day?

A. I seen him in the morning once, around 9:30 or 10 o'clock.

Q. When did you next see him?

A. In the afternoon.

Q. What time?

A. A couple of times between three and five.

Q. You saw him twice between three and five?

A. Yes." (Tr. p. 5).

The Indictment then alleges:

"Whereas, in truth and in fact, as he, the said George Shawle, alias George Shallas, then and there well knew, the said Theodore Seivers was not at the Ethelyn Hotel in the city of Spokane, State of Washington, during *the afternoon and evening of October* 14*th*, 1928, during the time or times that the said George Shawle, alias George Shallas testified that the said Theodore Seivers was there, *or* at any other time on that day, and that the said George Shawle, alias George Shallas, did not see the said Theodore Seivers *during the afternoon* of October 14th, 1928, at the Ethelyn Hotel *or any other* place in the city of Spokane, in the State of Washington, whereby he**********" (Italics are ours) (Tr. pp. 5 and 6).

It becomes apparent that the Indictment alleges the truth to be (1) That Theodore Seivers was not at the Ethelyn Hotel in the city of Spokane, State of Washington, during the afternoon and evening of October 14th, 1928, during the time or times that the said George Shawle alias George Shallas testified he was there. (The times that Shallas testified that he was there were a couple of times between three and five o'clock in the afternoon of that day). (2) The indictment next alleges that Theodore Seivers was not there at *any other time* on that day.

In other words the indictment sets up two distinct allegations as to when Seivers was not at the Ethelyn Hotel on October 14, 1928,—(1) That he was not there twice between two and three o'clock in the afternoon and evening of October 14, 1928, and (2) That Seivers was not there at any other time on that

day. The only other times that Shallas testified that Seivers was there on that day was once between nine-thirty and ten in the morning and that he stayed there Sunday night (October 14, 1928). So the second allegation was directed to the answers of Shallas concerning times that Seivers was at the Ethelyn Hotel, other than twice between three and five in the afternoon. If the second allegation was a sufficient allegation of the truthfulness in that respect then, provided the government had been able to have proved to the satisfaction of the jury that Seivers was not there at those times it would have been sufficient, even though the government was unable to make the proof with respect to the afternoon. So, also the government could make its proof as to the two times between three and five in the afternoon and stand on that alone. There can be no question of the sufficiency of the allegations concerning what the truth was with respect to the afternoon.

Appellant concedes in his brief that there may be several perjuries alleged in one count and that proof with respect to any one is sufficient.

No contention is made that the indictment does not charge a crime; there is no specification of error with respect to that, no demurrer interposed or motion in arrest of judgment, sufficiency of the evidence to sustain the burden of proof imposed upon the government with respect to the afternoon of October 14, the only question raised by specification of error number one.

EVIDENCE SUFFICIENT TO SUSTAIN THE VERDICT.

Appellant argues that the evidence was insufficient for the reason that it consisted solely of the uncorroborated testimony of Seivers. There is no dispute that in perjury cases one cannot be convicted upon the testimony of a single witness uncorroborated; also the appellant and the government agree that one can be convicted of perjury upon the testimony of one witness corroborated by other circumstances independently proven. We will discuss the only question involved under this head, that is the degree of corroboration required by the courts.

Perhaps the most exhaustive discussion of the old rule with reference to perjury, and the modifications thereof, is in the case of U. S. vs. Woods, 39 U. S. 428. It is referred to by the Supreme Court in the case of Hammer vs. U. S., 271 U. S., page 620, at page 628, where the court says:

> "That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in U. S. vs. Wood, 14 Pet. 430, 433. That case shows that the rule, which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as perjury, *does not relate to the kind or amount of other evidence required to establish that fact.*" (Itallics ours)

The court does not attempt to lay down a rule that requires any particular amount or kind of corrobora-

tion. In the present case the court instructed the jury that they could not convict upon the testimony alone of Theodore Seivers; that they must find that this testimony was corroborated by other facts and circumstances established independently of his testimony, and under that instruction they found the defendant Shallas guilty, and in effect that the testimony of Seivers was corroborated.

This view is substantiated by Underhill's Criminal Evidence, 3rd Edition, page 917, Sec. 682, where it is said:

> "All relevant evidence, which, if true, tends to corroborate him, should go to the jury, and it is for them to determine whether the corroboration is sufficient to convince them of the falsity of the defendants testimony beyond a reasonable doubt."
>
> "It has been held repeatedly that while corroboration is essential, the additional evidence need not be such as standing by itself, would justify conviction in a case where the testimony of a single witness is sufficient for a conviction. The written or oral admission of the accused, or documentary evidence found in his possession, or in the possession of those who may be criminally associated with him, may be received as corroborative, and these, if believed by the jury, will be equivalent to another witness."

With respect to the latter part of the statement above quoted, we call attention to the register sheet of the Ethelyn Hotel which hotel was being operated by the defendant Shallas, together with some others, to the testimony relative to the change in the regis-

ter, and the introduction of the register, and that, in and of itself, irrespective of any other testimony, would be sufficient corroborative evidence and be, in the language of Underhill "equivalent to another witness."

Concerning appellants argument that the register sheet could have been changed by Seivers, we call attention to the fact that had Shallas' story been true there would have been no occasion for the alteration in the register, because unchanged it would have supported his testimony. He testified that the room was occupied by Seivers and that he had made arrangements for it, so, of course, it would not have been rented to anyone else.

The Ninth Circuit Court of Appeals in the case of Holy vs. U. S., 278 Fed. 521, states:

> "A conviction of perjury may be based upon the testimony of a single witness supported by documentary evidence."

The Circuit Court of Appeals for the Eighth Circuit in the case of Gordon vs. U. S., 5 Fed. (2) 943, at page 945, in discussing the rule relative to the evidence sufficient to sustain a conviction of perjury, says:

> "Conceding that there was a time when a rule prevailed in many courts to the effect that the testimony of two witnesses, or of one witness and corroborating circumstances, was essential to sustaining a conviction for perjury, that rule has long since been relaxed, and such testimony is no longer essential to warrant a verdict of

> perjury. Clear and direct testimony of one or more witnesses, or the testimony of one witness and convincing corroborating circumstances, or indubitable facts absolutely incompatible with the truth of the testimony charged to be false, may be ample to sustain a verdict of perjury."

The same court in a much earlier case, Hashagen vs. U. S., 169 Fed. 396, at page 399, used the following language:

> "But this strictness has long since been relaxed, and we find many cases in the books where convictions have been sustained upon testimony of a single witness, corroborated by circumstances proven by independent evidence *sufficient to warrant the jury in saying that they believed one rather than the other.* In other words, the evidence of the witness, together with the other facts and circumstances proved on the trial, must be something more than sufficient to counterbalance the oath of the defendant and the legal presumption of his innocence." (Italics ours)

As we view the decisions hereinbefore cited, the tendency of the courts has been to relax generally the rule relative to the conviction for perjury and the rule as the courts not define it, is that a conviction for perjury may be had upon the testimony of a single witness, if there is any other evidence introduced or facts independently proven or documentary evidence or other circumstances from which the jury might find that the testimony of the single witness is substantiated or corroborated sufficiently for them to say that they believe beyond a reasonable doubt the truth of the charge.

The following synopsis of the testimony of the witnesses as to the presence of Theodore Seivers at Tensed, Idaho, during the afternoon and evening of October, 14th, 1928 is further corroboration of the fact that Theodore Seivers was not in the Ethelyn Hotel at Spokane, Washington, on two occasions between three and five o'clock on the afternoon of October 14th, 1928.

W. A. Shaw testified that he attended a dinner party at the W. H. McNeal residence in Tensed, Idaho, on October 14th, 1928; it was a farewell dinner as Mr. McNeal was leaving; that he saw Theodore Seivers during the afternoon of October 14th, at Tensed, Idaho. That he first saw Theodore Seivers drive up in his car in front of his residence with his wife, Mrs. Laura Seivers; they got out of the car and Theodore Seivers took out some packages out of the car and they went in the house; that Theodore Seivers came back out again but that Laura Seivers did not; that he had occasion to pass by the Seivers place on the afternoon of October 14, 1928, twice, at one time about four o'clock and another time about five o'clock, and that at both times he saw Seiver's car there. (Tr. p. 35).

Obviously from this testimony it was sometime prior to four o'clock in the afternoon that W. A. Shaw saw Seivers come there with his wife, and remove some packages, because he testified that he saw them come there and move these packages and he

passed their residence on two different occasions, once about four and once about five, and on both occasions saw the car there.

W. A. Weiss testified that he attended this farewell dinner given at Mr. McNeal's place at Tensed, Idaho, on October 14, 1928, and that he saw Theodore Seivers around the car in front of his place where he lived at Tensed, Idaho, as follows: (Tr. p. 37).

> "Yes, I seen them there around that car probably three or four times that afternoon. In fact, Ted was working on the car and he was in and out of the house and around the car practically all afternoon." (Tr. p. 37).

He also testified that he saw the car some time between 6:30 and 7:00 o'clock when he left for home. (Tr. p. 38).

W. H. Phillips testified that he lived at Tensed, Idaho, and was a farmer laborer. That he attended the dinner at McNeal's on October 14th, 1928, at Tensed, Idaho. (Tr. p. 38). That there were two servings of dinner at the McNeal place that afternoon, and that he had a second serving. (Tr. p. 40). That he arrived a little late, that upon arriving there he saw Theodore Seivers and his wife in front of the Seivers place at Tensed, Idaho; that he thought it was somewhere around one thirty in the afternoon of October 14, 1928. (Tr. p. 39). This witness testified positively that at the time he went to the McNeal home for dinner, that he saw Seiver's car and Seivers

and his wife in front of the Seiver's place in Tensed, Idaho, so he fixes the time by that fact; he testifies that he came there late and had dinner during the second serving. (Tr. pp. 38 and 39).

W. H. McNeal testified that during October 1928, he lived in Tensed, Idaho, where he was engaged in business. That on October 14, 1928, he gave a farewell dinner at his place as he was leaving for Davenport, Washington. He named the parties present at the dinner. (Tr. p. 40). That he was acquainted with Theodore Seivers and his wife and knew the car that they drove, which was a Maxwell coupe, that he saw Seivers the afternoon of the 14th of October, 1928; that the car drove up in front of Seiver's house and they got out and Seiver's wife went into the house and Seivers went around the car and got some parcels out and then went into the house. (Tr. p. 40). That he did not notice the car being taken away from there at any time after that, or any time that evening. He said he was not able to give the exact time that he first saw them, but that dinner was served about one o'clock and that after they had eaten they had gone outside probably around 1:30 or 2 o'clock, and that Seivers and his wife drove up while McNeal and some of his company were out front talking. He was not able to say just how long it was after they had gone out in front of his place. (Tr. p. 41).

McNeal's testimony, taken together with the testi-

mony of Weiss, would indicate that perhaps somewhere around two or two-thirty during that afternoon, was the approximate time that Seivers came there, and that from that time on, for the rest of the afternoon and that evening, Seiver's car remained there in Tensed, Idaho. This evidence positively precludes all possibility of Seivers being at the Ethelyn Hotel in Spokane, Washington, on the two occasions between three and five o'clock during the afternoon of the 14th day of October, 1928.

The next witness to testify for the government was the witness *R. J. Hart,* who testified he was a special officer in the Indian Service and was working on the Coeur d' Alene Indian Reservation; that he was in Tensed, Idaho, on October 14th, 1928, and that he saw Theodore Seivers there during the afternoon of the 14th day of October, and also his car, a Maxwell coupe. That he did on several occasions go through Tensed during the evening of October 14th, 1928, and in the early morning of the 15th about six o'clock. (Tr. pp. 41 and 42).

The testimony of the witnesses whose evidence we have just briefly outlined, shows that Theodore Seivers and his wife drove up in front of their house in Tensed, Idaho, on October 14th, 1928, some time between two and three o'clock during the afternoon of October 14th, 1928, and that the said Seivers was seen in and arround the car all of the rest of the afternoon and that his car, the Maxwell coupe, re-

mained in front of his place from then on, and was not removed during that afternoon or evening.

The evidence also affirmatively shows that Tensed is located some 60 miles out from Spokane, Washington, where the Ethelyn Hotel is situated, thus making it impossible for Shallas to have seen Theodore Seivers in the Ethelyn Hotel on two different occasions between three and five o'clock, during the afternoon of October 14th, 1928.

It seems to us that this testimony certainly corroborates the testimony of Theodore Seivers that he was not in the Ethelyn Hotel on two different occasions or at any time during the afternoon of October 14th, 1928, because it makes it impossible for him to be there at the times which the appellant Shallas testified that he was on that afternoon.

A CONVICTION OF PERJURY MAY BE SUSTAINED UPON THE TESTIMONY OF A SINGLE WITNESS IF THE TESTIMONY OF THE DEFENDANT IS UNSATISFACTORY AND CONTRADICTORY.

This court in a decision rendered where there was involved a charge of perjury does not directly discuss in so many words the question of corroboration, but it does discuss the degree of proof required which we believe to be one and the same thing.

The case to which we refer is Vedin vs. United States, reported in 257 Fed., 550; the opinion of the court was delivered by Circuit Judge Gilbert. In

that case, an indictment was returned by the Grand Jury, charging the defendant with perjury arising out of certain affidavits made by him relative to assessment work supposed to have been done upon certain mining property in Alaska. The court was of the opinion that the testimony of the government was wholly insufficient to sustain a conviction of the crime of perjury, but says that the defendant saw fit to take the witness stand himself and testify and because of his testimony which was contradictory and unsatisfactory, that, that in and of itself was sufficient to justify a verdict of guilty for the crime of perjury.

Vedin vs. United States, 257 Fed. 550 at p. 552.

> "The evidence for the prosecution, if it stood alone, would clearly be insufficient to sustain a conviction of perjury.********If the plaintiff in error had stood upon his motion to dismiss, made at the close of the testimony, a different case would now be presented. But he waived his motion by testifying in his own behalf, and in the discrepancy of his own testimony as to the work done, and by whom it was done, and the rebuttal of portions thereof by the witnesses for the government, there is evidence tending to show that the affidavits were false,—Judgment sustained." Petition for a Writ of Certiorari denied.
>
> 260 U. S. 663.

This is the same as saying that even though the government's case is insufficient to warrant a verdict, if the defendant sees fit to take the stand him-

self and his testimony is contradictory and unsatisfactory, that, in and of itself, will satisfy the degree of proof required by the courts in perjury cases.

It is applicable to the case here under discussion for the reason that Shallas himself saw fit to take the witness stand and his testimony was contradictory in many respects and we believe highly unsatisfactory.

The following are some of the contradictions:

At the time appellant testified in case Number 2828, which testimony was the foundation of the perjury charged, Shallas testified positively that Seivers was at his hotel twice between three and five the afternoon of October 14, 1928, and that there was no chance of his being mistaken. (Tr. p. 49). Then at the time of the trial of this case, Shallas qualified the statement by saying as best he could recall, but admitted that he had not qualified his answers before in any way, (Tr. p. 49). Also Shallas admitted that he had testified in the liquor case that Seivers checked out on the morning of October 15, 1928, and that Seivers paid Shallas personally at that time, (Tr. pp. 48 and 49). In the present case Shallas testified that Mrs. Seivers paid him one night's room rent when she came there Saturday, (October 13, 1928), (Tr. p. 48). Shallas also testified in the present case that he did not know Mrs. Seivers signature and that he did not see her sign the register as he was sitting in the lobby. (Tr. p.

52). But Shallas, a witness in his own behalf, in this case, testified that as a witness in case number 2828, he identified the signature of Mrs, Seivers on the register sheet. (Tr. p. 47). Shallas testified in case number 2828, that they (Mr. and Mrs. Seivers) stayed at the hotel Sunday night (October 14, 1928), (Tr. p. 5). Then herein as a witness in his own behalf testified that he did not know whether Seivers slept in the room Sunday night, but that he did know that Seivers had made arrangements for that room Sunday night, (Tr. p. 48). And again during Shallas' testimony in his own behalf he testified that his best recollection was that they stayed there on the 13th, 14th and 15th, and that he saw them (Seivers) there Sunday afternoon *or* Monday, (Tr. p. 54). In the liquor case he testified positively (Tr. pp. 49, 4 and 5).

There are many other conflicts in Shallas' testimony.

We find this rule further supported in the case of State vs. Miller, 24 W. Va. 802.

> "When a prisoner testifies in his own behalf, his manner of giving testimony may be sufficient corroboration to justify conviction on the testimony of one witness for the prosecution."

SPECIFICATION OF ERROR 2.

It was no error for the court to refuse to give appellant's requested instruction No. 2, as it would have been an erroneous statement of the law applicable to this case under the allegations of the indict-

ment as in this brief just discussed. This requested instruction would have precluded a verdict of guilty, unless the jury found in favor of the government upon each and all, of the several allegations of falsity. It was sufficient to find in favor of the government upon one only. Under the evidence, if the requested instruction was correct, the court should never have permitted the case to go to the jury, but would have been required to direct a verdict of acquittal, since the government itself proved that Seivers was in Spokane on the morning of October 14. But the material fact in the liquor case was Seiver's whereabouts during the afternoon of October 14, when the sale took place at Tensed. This Shallas knew, because Seivers had told him of the sale, and this, the indictment alleges to have been one of the false material matters testified to by Shallas in the liquor case.

The same argument is true of the exception taken to the instructions given by the court.

We respectfully submit there is no error and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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In the United States

Circuit Court of Appeals

for the Ninth Circuit

GEORGE SHALLAS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 5918.

PETITION FOR REHEARING

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GREEN-BERRY-HUGHES PTG CO.

In the United States

Circuit Court of Appeals

for the Ninth Circuit

GEORGE SHALLAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 5918.

PETITION FOR REHEARING

Comes now the appellant and petitions the court for a rehearing herein upon the following grounds:

I.

The Court decided this case solely upon the appellee's motion to strike the bill of exceptions for the reason that it was not settled or allowed within the term at which the judgment was entered. We respectfully submit that the opinion itself shows on its face that in deciding this question the Court wholly overlooked the fact that a motion for a new trial was interposed, argued and taken under advisement by the trial court, and that a decision was not reached by the trial judge, nor was an order entered on this motion, until after the May term had been adjourned.

The opinion by Judge Rudkin does not mention the motion for a new trial, but merely sets out the date of the judgment, the date of the adjournment sine die of the May term and the fact that the bill of exceptions was not presented or allowed until after the term had expired and the court had lost jurisdiction to act in the matter. Unquestionably the Supreme Court has held in the cases cited in the opinion that under such a state of facts the court would have no jurisdiction to settle or allow the bill of exceptions. But we most earnestly urge that that is not the question involved in this case, and that the opinion does not state all the facts in this regard and shows no reason at all why after judgment was entered on June 5, 1929, no order was presented extending the time to serve and file the bill of exceptions till July 27, 1929.

The questions to be decided in this case in regard to the motion to strike the bill of exceptions are these:

(1) Did the fact that a motion for a new trial was made and filed and argued on the day judgment was entered, and on said day taken under advisement by the court, continue jurisdiction of the case in the court, even though the term of court was adjourned before the motion was decided; and (2) did the filing of the motion for a new trial stay the running of the time within which to file a bill of exceptions?

In neither of the Supreme Court cases cited in the opinion of this court, (O'Connel v. U. S. 253 U. S. 142, and Exporters v. Butterworth-Judson Co., 258 U. S. 365), are these questions discussed or decided. In both cases the term in which the judgment was entered expired before the bill of exceptions was served and settled, or the time within which to so settle the bill extended, but in neither case was there a motion for a new trial pending and undecided when the term ended.

There is, on the other hand, a large number of cases from a majority of the Circuit Courts of Appeal holding that the time in which to file a bill of exceptions does not begin to run until a motion for a new trial, presented within time and within the term, is disposed of.

In Woods v. Lindvall, 48 Fed. 73 (8th Cir.), the judgment was entered at the January, 1891, term

and a motion for a new trial was filed at that term, but the January term adjourned sine die before the motion was heard or determined. At the succeeding term, the petition for a new trial was argued and overruled, and the bill of exceptions was signed, sealed and filed, and objection was made to the allowance of the bill because the trial term had expired, and the court said:

> "We are all agreed that the motion to strike out the bill of exceptions should be overruled. It is true that in several cases cited by counsel for defendant in error, to-wit, Walton v. U. S., 9 Wheat. 651; Ex parte Bradstreet, 4 Pet. 102, and Muller v. Ehlers, 91 U. S. 249,—it was held in effect that, in the absence of an order of court extending the time, a bill of exceptions covering errors committed at the trial cannot be allowed and filed (unless by consent of parties) after the term has expired at which the judgment was rendered. But in none of these cases did the question arise whether a bill of exceptions may not be allowed and filed at the term when the motion for a new trial is finally acted on, even though such action is taken at a term subsequent to the entry of judgment; and that is the precise question which confornts us in the case at bar. The authorities cited are either cases in which no motion for a new trial was filed, or in which the bill of exceptions was presented after the lapse of the term in which the motion for a new trial was overruled. According to well-established principles, therefore, the judgments involved had become final at a term preceding that at which a bill of exceptions was tendered. Since the decision in Rutherford v. Insurance Co., 1 Fed. Rep. 456, we believe the practice has been uniform in all the districts of this cir-

cuit, where the custom prevails of entering judgment immediately on the rendition of the verdict, to allow a bill of exceptions during the term at which the motion for a new trial is overruled, even though it happens to be a term subsequent to the entry of judgment. This practice, according to our observation, has become so common that it may be termed a rule of procedure in this circuit. It is a convenient practice. It obviates the necessity of settling a bill of exceptions at the trial term, which is useless labor if a motion for a new trial is continued to and is sustained at the succeeding term. And in these days, when it is customary to take notes of trial proceedings in shorthand, the practice in question is not open to those objections formerly urged against it. We are of the opinion, therefore, that the practice which has hitherto obtained in many districts of the circuit should be upheld unless it is overborne by controlling authority, and we find no such authority. On the contrary, we think the rule requiring bills of exception to be filed at the term when judgment is rendered must be understood to mean the term when the judgment becomes final, and by reason of its becoming final the court loses control of the record. It has been held several times that, if a motion for a new trial is duly filed by leave at the trial term, the judgment does not become final until such motion is determined. Rutherford v. Insurance Co., supra; Brown v. Evans, 8 Sawy. 502, 17 Fed. Rep. 912; Railway Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. Rep. 497; Brockett v. Brockett, 2 How. 238; Memphis v. Brown, 94 U. S. 716, 717; Slaughter-House Cases, 10 Wall. 289. In some of the state courts, also, the precise question of practice now before us has been determined adversely to the defendant in error. Thus, under a statute of the state of Missouri requiring all exceptions to be filed

during the term at which they were taken, and all exceptions during the trial of a cause to be embraced in one bill, it has been held that the continuance of a motion for a new trial from the trial term to a succeeding term keeps the record open, prevents the judgment from becoming final, and enables the court to allow a bill of exceptions during the term at which the motion is finally determined. Riddlesbarger v. McDaniel, 38 Mo. 138; Henze v. Railroad Co. 71 Mo. 636, 644. See, also, Bank v. Steinmitz, 65 Cal. 219, 3 Pac. Rep. 808. We hold, therefore, that the bill of exceptions in the present case was properly allowed and filed, and we accordingly overrule the motion to expunge it from the record."

In Merchant's Insurance Co. v. Buchner, 98 Fed. 222, the Sixth Circuit arrived at the same conclusion and said:

"1. A preliminary question is made by the defendant in error as to the allowance of the bill of exceptions. It appears that a judgment of $3,500 in favor of Buckner & Co. was rendered on January 28, 1898. On the same day, plaintiff in error filed a motion for a new trial, and in reference thereto the following order was made by the court:

" 'This day came again the parties, and defendant filed a motion for a new trial herein; and it is ordered that execution do not issue upon the judgment in this case until the further order of this court, and, on motion of defendant, it is allowed sixty days in which to tender and file a bill of exceptions herein.'

"The motion for a new trial was not disposed of until the following June term of the court. On the 9th day of June the court, having considered the motion of the defendant for

a new trial, found the verdict of the jury in favor of the plaintiffs to be excessive, and ordered that a new trial be granted unless the plaintiffs, by a proper writing, remit $1,500 thereof. On the same day defendant was allowed 60 days in which to file a bill of exceptions, to which order plaintiffs excepted. It is urged that, in the absence of any rule to the contrary, a bill of exceptions must be filed during the term at which the trial was had. Defendant, having failed to file the bill within the time limited, is not, it is claimed, within the rule which permits the filing thereof where the motion for a new trial has been continued to a subsequent term. The general rule as to the allowance of bills of exceptions is thus stated by Mr. Justice Gray (Bank v. Eldred, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162):

" 'By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by or der entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or to amend a bill of exceptions already allowed and filed, is at an end. U. S. v. Breitling, 20 How. 252, 15 L. Ed. 900; Muller v. Ehlert, 91 U. S. 249, 23 L. Ed. 319; Jones v. Machine Co., 131 U. S. Append. 150, 24 L. Ed. 925; Hunnicutt v. Petyon, 102 U. S. 333, 26 L. Ed. 113; Davis

v. Patrick, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; Chateaugay Ore & Iron Co. Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508.'

"In cases where a motion for a new trial is regularly filed, and not acted upon, there seems to be no necessity for a presentation of the bill, as the granting of the motion will render it entirely unnecessary so to do. It has been the practice in this circuit to permit the bill to be filed after the motion has been overruled, although such action be had at a subsequent term of court, and we see no reason to depart from this practice in this case. When the motion for a new trial was filed, it was ordered that defendant be granted 'sixty days in which to tender and file a bill of exceptions,' but the purpose of the court to reserve control of the judgment until the motion for a new trial trial should be acted upon is shown in the order withholding execution until further order of the court. At the June term, when the court passed upon the motion, a further time of 60 days was granted to the plaintiff in error within which to file a bill of exceptions. The bill was presented within this time, and we are of the opinion that it was in time, and properly allowed."

In this case it will be observed that the Circuit Court takes full cognizance of the general rule laid down by the Supreme Court in Bank v. Eldred, 143 U. S. 298, and O'Connell v. U. S., supra, and Exporters v. Butterworth-Judson Co., supra.

In Tullis v. Lake Erie & W. R. Co., 105 Fed. 554, the seventh Circuit also approves the rule, and the Court says:

"While it is well settled that a bill of exceptions can be signed only at the term of court at which the trial was had and judgment entered, or within an extension of time then granted (Brooder Co. v. Stahl, 42 C. C. A. 522, 102 Fed. 590), yet if by reason of a motion for a new trial or rehearing or to set aside the judgment, entered at the term, the power of the court over the judgment is retained, a bill of exceptions may be settled or time given for preparing it when the motion is overruled, whether at the same or a later term (Woods v. Linvall, 1 C. C. A. 34, 48 Fed. 73, 4 U. S. App., 45; Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Railroad Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. 497, 28 L. Ed. 492; Smelting Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986; Voorhees v. Manufacturing Co., 151 U. S. 135, 14 Sup. Ct. 295, 38 L. Ed. 101). 'Until then the judgment or decree does not take final effect for the purpose of a writ of error' (Smelting Co. v. Billings); and until then there is no good reason for saying that the time for settling a bill of exceptions, the necessity for which could not be known sooner, had passed. This proposition is not affected by the fact that in the federal courts the ruling upon a motion for a new trial is discretionary, and not reviewable."

In Kentucky Distilleries & Warehouse Co. v. Lilliard, 160 Fed, 34, the Court said:

"The facts on which the motion is made are these: A judgment in favor of the defendants for $7,000 was entered in the usual form on October 4, 1905. On the following day, the court being still in session, the plaintiff entered a motion for a new trial, and the entry on the journal was 'the court not being suffciently advised on said motion takes time.' The court

thereupon assigned the motion for argument on the 3d day of April, 1906. The motion was argued by counsel for both parties at a session of the court at Covington, before the commencement of the next term at Frankfort where this cause was pending. The next term of the court at that place passed without any proceedings in this cause; and nothing further was done until February 27, 1907, when an order was entered denying the motion for a new trial, and giving the plaintiff 60 days within which to prepare and file a bill of exceptions. On the 17th day of April, 1907, a bill of exceptions was presented to the court by the plaintiff and was allowed by the judge, and was filed and ordered to be made a part of the record in the cause. And an entry to that effect was made upon the journal of that day. It is stated by counsel for defendants at the bar that the bill was allowed without any notice of its intended settlement, and in vacation. From the record it would seem, however, that the court was in session when the bill was presented, and, on being allowed by the judge, was ordered to be made part of the record, and the record must control. We do not intend any implication that we think a bill of exceptions may not be settled by the judge in vacation. As to whether notice was given of its intended settlement, or whether counsel for plaintiff was present, the record is silent. Inasmuch as the notice if given would pass from counsel for one party to those of the other, it would not ordinarily appear in the records of the court. No motion was made in the court below for amendment of the bill; nor was any complaint made there, nor is there here, that the bill does not truly and fairly represent the proceedings on the trial of the cause. *The principal ground on which the motion to strike it out is based is that the court lost control over the case upon the lapse of the*

term at which the judgment was entered. This is undoubtedly the rule, if at the expiration of the term the judgment continues final. But if a motion for a new trial has been made or some other relief against the judgment which that court has power to grant has been prayed, and the court, instead of dismissing the motion, holds it for further consideration and disposition at a subsequent term, the judgment is not final, but subject to the further action of the court until the expiration of the term at which the court disposes of the objections made to the judgment. It is sufficient to cite the cases of Merchants' Ins. Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19, a case decided by this court, and the opinion by Judge (now Justice) Day in discussing this subject, and Minahan v. Grand Trunk Western Ry. Co., 138 Fed. 37, 41, 70 C. C. A. 463; citing Ward v. Cochran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195. The motion must be denied."

(Italic ours.)

In Mahoning Valley Ry. Co. v. O'Hara, 196 Fed. 945, the court holds:

"It is well understood, as a primary rule, that exceptions at the trial must be reduced to form and made a part of the record during the term at which judgment is rendered (Muller v. Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319); but it is also settled that the judgment is not finally entered, so as to be beyond the control of the court at a later term, until a pending motion for new trial is denied (Kingman v. Western Mfg. Co., 170 U. S. 675, 678, 18 Sup. Ct. 786, 42 L. Ed. 1192; In re McCall (C. C. A. 6) 145 Fed. 898, 76 C. C. A. 430.) The considerations which lead to this latter result are applicable here. *It would be a vain thing to settle a bill*

> *of exceptions upon a judgment still contingent; and we are clear that the court had full power over this subject during the remainder of the term at which the motion for new trial was decided.* It follows that plaintiff in error is entitled to be heard upon all its assignments."

And this holding is reaffirmed by the Sixth Circuit in Camden Iron Works v. Sater, 223 Fed. 611.

In O. C. Moore Grocery Co. v. Pac. Rice Mills, 296 Fed. 828, (8th Cir.), the verdict was returned and the judgment was entered at the May term of the court. A motion for a new trial was filed during that term. It was overruled at the October term. The bill of exceptions was approved at the October term. The Court said:

> "It has long been the rule in this and other circuits that a bill of exceptions is presented in time if it is presented for allowance at the term at which the motion for a new trial is determined, although that term is subsequent to the term at which the trial was had and the judgment entered, if the motion for a new trial was filed at the trial term and the hearing of it was continued by the court to a subsequent term."

In Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641, (First Circuit) the judgment was entered at the September term and motion for a new trial at once made, which was not disposed of till the May term. There was a local rule of court requiring the bill of exceptions to be filed within twenty days, and upon motion to strike the bill of exceptions because not filed within twenty days, the Court said:

> "According to the letter of the rule, a bill of exceptions is to be filed within 20 days after the verdict of the jury. But where a motion for a new trial is interposed, the verdict, as well as any judgment that may have been entered thereon, becomes contingent until the motion has been passed upon and determined. Until then it cannot be known that there is any occasion for filing a bill of exceptions, and, this being so, no good reason can exist for saying that the time for doing so has begun to run or is past. It has been the practice in this circuit, as well as in other circuits, to allow bills of exceptions to be filed within 20 days from the denial of a motion for a new trial and to allow an extension of time for this purpose, if applied for within the twenty days. Merchants' Insurance Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19; Kentucky Distilleries & Warehouse Co. v. Lillard, 160 Fed. 34, 87 C. C. A. 190; Mahoning Valley Ry. Co. v. O'Hara, 196 Fed. 945, 116 C. C. A. 495; Tullis v. Lake Erie & W. R. Co., 105 Fed. 554, 557, 44 C. C. A. 597."

In U. S. Ship Corp. v. Galveston Dry Dock Co. 13 Fed. (2d) 607, the latest case on the subject, the Fifth Circuit concurs, and the court says:

> "There is no merit in the plaintiff's motion to strike the bill of exceptions, which was signed during the term at which the motion for a new trial was overruled. The time for signing a bill of exceptions and suing out a writ of error did not begin to run until the court acted on the motion for a new trial. Texas Pacific Railway Co. v. Murphy, 111 U. S. 488, 4 S. Ct. 497, 28 L. Ed. 492."

In this case a Writ of Certiorari was denied, (71 L. Ed. 860, 47 Sup. Ct. 237).

To the same effect are:

Missouri, K. & T. Ry. Co. v. Russell, 60 Fed. 501;

United States v. Carr, 61 Fed. 802;

Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 444 (4th Circuit).

If these authorities are correct, and we have found none to the contrary, then the rule is that the court has jurisdiction during the term at which the petition or motion for a new trial is finally disposed of and that the judgment is contingent or conditional until the petition or motion is decided. Applying the rule to the facts in this case, the court having taken the motion for a new trial and to set aside the judgment under advisement, continued to retain jurisdiction of the case, and the mere fact that the term of court ended either by lapse of time or order of adjournment did not divest it of jurisdiction of this case. The judge could still grant or deny the motion, and he denied it. Then for the first time was it certain that there would be any necessity for a bill of exceptions and the time within which to settle the bill began to run, and the court had jurisdiction until a new term began to settle the bill or extend the time. The new trial was denied on July 11, 1929, the May term had adjourned on June 19, 1929, and the next term did not commence until the third Monday in November, 1929. It is our contention that the court had jurisdiction to settle the bill during the remainder of the term and until the November term commenced.

In this connection we call your Honor's attention to Farmers Union Grain Co. v. Hallet & Carey Co. 21 Fed. (2d) 42, (8th Cir.). The case was tried in the District Court of South Dakota, Northern Division. By statute there were two terms a year, on the first Tuesday in May and the second Tuesday in November, (just as there are two terms a year by statute of the District Court of Idaho at Coeur d'Alene in May and November). In 1926, the year in question, the May term began on May 4, the trial was had to the court without a jury on May 8th, and on May 8th the court adjourned sine die, but without deciding the case. The decision of the court was not rendered and the findings and judgment entered until August 17th, about three months before the November term began, and in passing on a motion to strike the bill of exceptions, the court held that the term extended till the November term began, regardless of the order of adjournment sine die prior to the rendering of the judgment. This case, we submit, is squarely analagous to the situation here. In that case the judgment was rendered after the adjournment sine die of the May term and before the commencement of the November term, and in this case the order refusing to vacate the verdict and denying a new trial, which in effect makes the judgment final, was so entered.

If, in the one case the term should be considered to continue until the time limited by law, so should it in the other case. And this is only good common sense, for otherwise a judge who has reserved mat-

ters for consideration, whether judgments in cases already tried to him, or motions for new trial, etc., may through inadvertance adjourn his term, without notice to the parties interested, and summarily and unintentionally cut off their rights. Clearly, as the Eighth Circuit holds, the law will not be given any such strained and unjust interpretation as that.

Counsel is presumed to know the terms of court provided by statute and protect his rights accordingly, but surely one has a right to believe that a judge who has taken a matter under advisement will not divest himself of the power to act by adjourning his term of court before deciding the matters under advisement.

As we understood appellee's argument on his motion to strike the bill of exceptions at the hearing of this case, he did not seriously contend that the court lost jurisdiction prior to the entry of the order denying the motion for a new trial, but placed his reliance on Rule 76 of the local court and the fact that an extension of time was not secured within ten days after the order denying the motion for a new trial was entered.

In this regard we wish to call your Honor's attention to the case of Southern Pac. Co. v. Johnson, 69 Fed. 559, decided by this court by Justice McKenna and Judges Gilbert and Morrow.

In that case Rule 25 of the Circuit Court of Nevada was for all purposes of this argument identical

with Rule 76 of the Idaho Court and required the bill of exceptions to be served on the adverse party within ten days, etc., and this court said:

> "The verdict was returned and judgment entered on June 17, 1893, which was during the March term. The bill of exceptions was not presented for allowance or settlement, nor was the same allowed or settled and certified to, until September 18, 1893,—90 days subsequent to the verdict and entry of judgment. These proceedings were, however, still within the March term of the circuit court for the district of Nevada, the court having but two terms during the year,—one beginning on the third Monday of March, and the other on the first Monday of November. 19 Stat. 4. No orders of court, or stipulations between the parties, extending the time within which to prepare and present the bill of exceptions, appear of record in the transcript. On June 24, 1893,—seven days subsequent to the verdict and judgment,—notice of a motion for a new trial was given by plaintiff in error. This, however, was not disposed of until September 18, 1893, when, as an alternative to the granting of a new trial, the defendant in error consented to a reduction of the verdict from $25,000 to $15,000. According to the rules of the circuit court, above referred to, no further time having been granted by the court, or consented to by the parties, the time within which to file a bill of exceptions expired on June 27, 1893. By the strict terms of these rules, the bill of exceptions would be deemed to have been abandoned, and the right thereto waived. *But adjudications in the supreme court of the United States and in the circuit court of appeals hold that rules of court fixing the time within which bills of exceptions are to be presented, allowed, or settled, and certified to by the trial judge, are*

merely directory. These decisions are to the effect that such rules do not control absolutely the action of the judge; that he is at liberty to depart from their terms, to subserve the ends of justice. U. S. v. Breitling (1857) 20 How. 254; Dredge v. Forsyth (1862) 2 Black, 568; Muller v. Ehlers (1875) 91 U. S. 249; Hunnicutt v. Peyton (1880) 102 U. S. 350; Chateaugay Ore & Iron Co. Petitioner (1888) 128 U. S. 544, 9 Sup. Ct. 150; Hume v. Bowie (1893) 148 U. S. 245, 13 Sup. Ct. 582. Such is the law of this circuit, as declared in the case of Southern Pac. Co. v. Hamilton, 4 C. C. A. 441, 54 Fed. 468, 474. In other words, these rules are regarded as rules of procedure, which may be dispensed with, in the discretion of the judge, provided, always, that the exceptions themselves are seasonably taken and reserved. As was tersely stated by the supreme court in Dredge v. Forsyth, supra:

" 'It is always allowable, if the exceptions be seasonably taken and reserved, that it may be drawn out in form, and sealed by the judge, afterwards; and the time within which it may be so drawn out and presented to the court must depend on the rules and practice of the court, and the judicial discretion of the presiding justice.'

"But it would seem that the exercise of this discretion is limited, under ordinary circumstances, to the same term in which judgement is rendered. Preble v. Bates, 40 Fed. 745. It cannot be done at a subsequent term, except, perhaps under very extraordinary circumstances. See cases cited supra; also, Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450; U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840; Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. 43; Ward v. Cochran, 150 U. S. 597, 602, 14 Sup. Ct. 230; Railway Co. v. Russell, 9 C. C. A. 108,

60 Fed. 501; Miller v. Morgan, 14 C. C. A. 312, 67 Fed. 82. No such objection arises here, however, since the bill of exceptions was settled and certified to within the same term that the verdict and judgment were entered. The trial judge being empowered, according to the weight of authority, with a discretion as to when a bill of exceptions should be settled and certified to (so long as it is within the same term that judgment was entered, and, it would seem, under very extraordinary circumstances, beyond the term at which judgment has been rendered), the question which we are called upon to determine in this case is whether this discretion has been abused. We entertain no doubt that this question should be answered in the negative. There is not the slightest intimation that this discretion has been exercised to the detriment of the substantial rights of the parties. But, aside from the general and inherent power possessed by courts to suspend their own rules, or to except from their provisions a particular case, to subserve the ends of justice, we think that the pendency of the motion for a new trial is a sufficient reason in this case why the action of the trial court in settling and certifying to the bill of exceptions should be sustained. It appears that the bill was settled and certified to on the day the court disposed of the motion for a new trial, viz., on September 18, 1893. The function of a bill of exceptions is to make a record for the appellate court. Black, Law Dict.; Bouv. Law Dict.; Yates v. Smith, 40 Cal. 669. Had the motion for a new trial prevailed, it is obvious that the labor of engrossing, settling, and certifying to the bill of exceptions would have been entirely useless. It was deferred until the motion for a new trial had been disposed of. Whether the mere pendency of a motion for a new trial operates, ipso facto, as an extension

> of time to prepare and have settled a bill of exceptions, it is not necessary to decide, but it was certainly a circumstance proper to be considered by the trial judge in the exercise of his discretion."

The court then goes on to discuss the case of Woods v. Lindvall, supra, and expressly reserves its option as to the effect of the motion for a new trial which is still pending when the term ends.

Since that case was decided, as the above cited cases show, the First, Fourth, Fifth, Sixth, Seventh and Eighth Circuits have all held that it is the term at which the motion for a new trial is determined, rather than the one at which judgment is entered, that governs.

Clearly then the trial judge was within his rights in disregarding the letter of Rule 76 and granting the additional time to settle the bill of exceptions.

Briefly summarized, our contention is that by the great weight of authority the fact that this case was pending on a motion for a new trial when the order was entered on June 19, 1929, adjourning the term sine die, prevented such adjournment from affecting this case and that as to it the term would continue until it expired by statutory lapse of time, and that therefore the trial judge still had jurisdiction to settle the bill of exceptions, and Rule 76 is directory and not mandatory or jurisdictional and that for good cause shown the judge might disregard it. That in this case the trial judge exercised his discretion and the facts surrounding the entry

of the order denying the motion for new trial (Tr. 8) show that he did not abuse his discretion, and that the bill of exceptions was therefore settled and filed on time.

We respectfully submit that the opinion in this case is based on a misunderstanding of the facts, and does not therefore decide in any way the real issue as presented to the court, and to permit it to stand as the final opinion in the case would be to work a substantial injustice on appellant and his counsel, which we feel certain this court did not intend to do.

We submit further that every doubt should be resolved in favor of the defendant and no technicality allowed to stand in the way of a hearing on the merits of this case, involving as it does a heavy fine and long penitentiary sentence for the appellant, and especially since there is no claim on the part of the appellee that the bill of exceptions is not full, true and correct, or that the rights or interests of appellee have in any way been endangered or that any delay has resulted in bringing this case to this court for review.

We therefore respectfully and most earnestly request that this court proceed to dispose of this case on its merits, or grant the appellant a rehearing herein when this question can be more fully presented to the court than was done at the original hear-

ing, which was devoted largely to a hearing on the merits.

Respectfully submitted,
ROBERTSON & PAINE,
Attorneys for Appellant.

I hereby certify that in my judgment the above petition for rehearing is well founded and that it is not interposed for delay.

Attorney for Appellant.

No. 5919

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN CVITZKOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5919

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF COUNSEL OF RECORD.

FRED C. BROWN, Esq., 505 McDowell Building, Seattle, Washington,
Attorney for Appellant.

ANTHONY SAVAGE, Esq., 310 Federal Building, Seattle, Washington, H. P. DODD, Esq., 310 Federal Building, Seattle, Washington,
Attorneys for Appellee. [1*]

Wash. 9079.

United States District Court, Western District of Washington, Northern Division.

November, 1928, Term.

No. 400,007.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN CIVITKOVICH,
Defendant.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

INDICTMENT.

Vio. Act of Oct. 28, 1919, Known as the National Prohibition Act.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That JOHN CIVITKOVICH, on the eleventh day of August, in the year of our Lord one thousand nine hundred and twenty-eight, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully and unlawfully sell certain intoxicating liquor, to wit, four (4) ounces of a certain liquor known as whiskey, then and there containing more than one-half of one per centum or alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said JOHN CIVITKOVICH, as aforesaid, then and there unlawful and prohibited by the Act of Congress passed October

28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That JOHN CIVITKOVICH, on the eleventh day of August, in the year of our Lord one thousand nine hundred and twenty-eight, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, one (1) pint of a certain liquor known as whiskey, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, intended then and there by the said JOHN CIVITKOVICH for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said JOHN CIVITKOVICH, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such

case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That prior to the commission by the said JOHN CIVITKOVICH of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said JOHN CIVITKOVICH, on the 28th day of February, 1928, in cause No. 11,899, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the first offense of possessing intoxicating liquor on the 12th day of September, 1927, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT IV.

That JOHN CIVITKOVICH, on the thirteenth day of August, in the year of our Lord one thousand nine hundred and twenty-eight, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully and unlawfully sell

certain intoxicating liquor, to wit, two (2) ounces of a certain liquor known as whiskey, then and there containing more than one-half of one per centum or alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said JOHN CIVITKOVICH, as aforesaid, then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [6]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT V.

That prior to the commission by the said JOHN CIVITKOVICH of the said offenses of selling intoxicating liquor herein set forth and described in manner and form as aforesaid, said JOHN CIVITKOVICH, on the 28th day of February, 1928, in cause No. 11899, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the first offense of selling intoxicating liquor on the 12th day of September, 1927, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and

against the peace and dignity of the United States of America. [7]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT VI.

That JOHN CIVITKOVICH, from the eleventh day of August to the thirteenth day of August, inclusive, in the year of our Lord one thousand nine hundred and twenty-eight, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place or rooms situated at 520 Jackson Street, Seattle, Washington, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling and bartering intoxicating liquors, to wit, whiskey, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said JOHN CIVITKOVICH, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ANTHONY SAVAGE,
United States Attorney.
PAUL D. COLES,
Assistant United States Attorney. [8]

[Endorsed]: A true bill,

H. C. BELL,
Foreman Grand Jury.
ANTHONY SAVAGE,
U. S. Atty.

Presented to the Court by the foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court, Jan. 16, 1929.

ED. M. LAKIN,
Clerk.
S. E. Leitch,
Deputy. [9]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant, John Civitkovich, is guilty as charged in Count I of the indictment herein; and further find the defendant, John Civitkovich is guilty as charged in Count II of the indictment herein and further find the defendant, John Civitkovich, is guilty as charged in Count III of the indictment herein; and further find the defendant, John Civitkovich, is guilty as charged in Count IV of the indictment herein; and further find the defendant, John Civitkovich, is guilty as charged in Count V of the indictment herein and further find the de-

fendant, John Civitkovich, is guilty as charged in Count VI of the indictment herein.

ROBERT HOWES,
Foreman.

[Endorsed]: Filed June 13, 1929. [10]

[Title of Court and Cause.]

SENTENCE.

Comes now on this 13th day of June, 1929, the said defendant, John Civitkovich, into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said, wherefore by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of selling intoxicating liquor as charged in Counts 1 and 4 of the indictment; of possession of intoxicating liquor as charged in Count 2 of the indictment; of prior conviction of possession of intoxicating liquor as charged in Count 3 of the indictment; of prior conviction of selling intoxicating liquor as charged in Count 5 of the indictment, and of maintaining a common nuisance, in violation of the Act of October 28, 1919, known as the National Prohibition Act, and that he be punished by being imprisoned in the

Jefferson County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of four (4) months and to pay a fine of $250.00; and the defendant is hereby remanded into the custody of the United States Marshall to carry this sentence into execution.

Judgment & Decree, Vol. 6, page 255. [11]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant, John Civitkovich, and moves the Court to set aside the verdict of the jury heretofore entered herein, and grant a new trial, on the following grounds:

I.

Errors of law occurring during the trial, and excepted to by the attorney for the defendant.

This motion is based upon the records, files, and proceedings herein and upon the accompanying affidavit of John Civitkovich.

FRED C. BROWN,
Attorney for Defendant.

Office and P. O. Address:
505 McDowell Building, Seattle.

[Endorsed]: Received a copy of the within motion this 14th day of June, 1929.

ANTHONY SAVAGE
Attorney for Pltff.

[Endorsed]: Filed Jun. 14, 1929. [12]

[Title of Court and Cause.]

AFFIDAVIT OF JOHN CVITZKOVICH.

State of Washington,
County of King—ss.

John Cvitzkovich, being first duly sworn, upon oath, deposes and says: That he is the defendant in the above-entitled action; that he was arrested on the evening of November 27, 1928, at 520 Jackson Street by Federal Prohibition Officers Whitney and Corvin; that at the time of his arrest he did not have possession of any intoxicating liquor; that said Federal Prohibition Officers had arrested another man about one-half block away from 520 Jackson Street who had the possession of intoxicating liquor and said officers brought said party into 520 Jackson Street and placed affiant under arrest. That at said time and in the hearing and presence of the defendant Federal Prohibition Officer Whitney remarked to Federal Prohibition Officer Corvin that they had no case against defendant and in response to that statement Federal Prohibition Officer Corvin said, "Hell, I'll make a case against him." That if defendant had been permit-

ted to testify he would so testify and had a witness in court who was present and heard said conversation.

JOHN CVITZKOVICH.

Subscribed and sworn to before me this 13th day of June, 1929.

[Seal] FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle. [13]

[Title of Court and Cause.]

AFFIDAVIT OF FRED C. BROWN.

State of Washington,
County of King,—ss.

Fred C. Brown, being first duly sworn, upon oath, deposes and says: That he is the attorney for the above-named defendant; that after the arrest of the defendant, in conversation with Federal Prohibition Officer Corvin he stated to affiant that he did not contend that the liquor found upon the party that was brought in to 520 Jackson Street in the presence of John Cvitzkovich, had any relation to said John Cvitzkovich and that said John Cvitzkovich had nothing to do with that transaction.

FRED C. BROWN.

Subscribed and sworn to before me this 14 day of June, 1929.

[Seal] EMMETT G. LENIHAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Received a copy of the within affidavit this 14th day of June, 1929.

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Filed Jun. 14, 1929. [14]

[Title of Court and Cause.]

STIPULATION RE QUESTION PROPOUNDED TO FRED C. BROWN.

IT IS HEREBY STIPULATED by and between the United States District Attorney, representing the plaintiff, and Fred C. Brown, representing the defendant, that while John Cvitzkovich was a witness in his own behalf, a question was propounded to said defendant by Mr. Fred C. Brown to relate the conversation in his presence between Federal Prohibition Officer Whitney and Federal Prohibition Officer Corvin as to what was said at the time of his arrest; that the Court ob-

jected and refused to permit witness to answer and exception taken.

ANTHONY SAVAGE,
District Attorney.
By HAMLET P. DODD,
His Deputy.
FRED C. BROWN,
Attorney for Defendant.

[Endorsed]: Received a copy of the within stipulation this 14th day of June, 1929.

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Filed Jun. 14, 1929. [15]

[Title of Court and Cause.]

EXCEPTION TO DENIAL OF NEW TRIAL.

Comes now the above-named defendant and excepts to the ruling of the Court denying defendant a new trial.

FRED C. BROWN,
Attorney for Defendant.

[Endorsed]: Received a copy of the within exception this 20th day of June, 1929.

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed] Filed Jun. 20, 1929. [17]

PETITION FOR WRIT OF ERROR OF DEFENDANT, JOHN CVITZKOVICH.

To the Honorable GEORGE M. BOURQUIN, Judge of the Above-entitled Court:

John Cvitzkovich, by his attorney, Fred C. Brown, respectfully petitions that on the 13th day of June, 1929, the United States District Court for the Western District of Washington, Northern Division, gave judgment against your petitioner in the above-entitled cause; wherein, as appears from the facts of the record of proceedings herein, certain errors were committed which are more fully set forth in the assignment of errors herein;

NOW, THEREFORE, to the end that said matters may be reviewed and said errors corrected by the Circuit Court of Appeals for the Ninth Circuit, your petitioner prays for an allowance of a writ of error, and such other orders and processes as may cause all and singular the record and proceedings in said cause be sent to the Honorable Justices of the Circuit Court of Appeals for the Ninth Circuit, for review and correction;

And that an order be made, staying and suspending all further proceedings herein, pending the determination of said writ of error by said Circuit Court of Appeals. Provided, the record be filed in said court within 30 days herefrom.

FRED C. BROWN,
Attorney for Defendant, John Cvitzkovich.

[Endorsed]: Received a copy of the within petition this 15th day of June, 1929,

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Filed Jun. 20, 1929. [18]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant, John Cvitzkovich, by his attorney Fred C. Brown, and in connection with his petition for a writ of error herein assigns the following errors, which he avers occurred at the trial of said causes and which were duly excepted by him, and upon which he relied to reverse the judgment entered herein against him:

I.

The District Court erred in refusing to permit the defendant from testifying to the conversation between Federal Prohibition Officers Whitney and Corvin at the time of the defendant's arrest.

II.

The District Court erred in denying defendant's motion for new trial.

III.

The District Court erred in pronouncing judgment upon the defendant, John Cvitzkovich.

WHEREFORE, the said defendant, John Cvitz-

kovich, plaintiff in error, prays that the judgment of said Court be reversed, and this cause be remanded to said District Court with instructions to dismiss the same and discharge the plaintiff in error from custody and exonerate the sureties on his bail bond; and for such other and further relief as to the Court seems proper.

FRED C. BROWN,
Attorney for Defendant, John Cvitzkovich. [19]

[Endorsed]: Received a copy of the within assignment of errors this 15th day of June, 1929.

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Filed Jun. 20, 1929. [20]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR.

The plaintiff in error having duly presented his petition for a writ of error and assignments of error to the Circuit Court of Appeals, having duly issued and the Court having duly fixed the bond of plaintiff in error in the sum of fifteen hundred dollars ($1500.00), and said bond having been duly filed and approved; now, on motion of plaintiff in error,

IT IS ORDERED that the execution of the judgment herein be stayed, pending the determination of the writ of error in the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 20th day of June, 1929.

BOURQUIN,
Judge.

[Endorsed]: Received a copy of the within order this 15th day of June, 1929,

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Filed Jun. 20, 1929. [21]

[Title of Court and Cause.]

BOND OF JOHN CVITZKOVICH (APPEAL ON A STAY).

KNOW ALL MEN BY THESE PRESENTS, that we John Cvitkovich, as principal, and the American Bonding Company of Baltimore, as surety, jointly and severally acknowledge ourselves to be indebted to the United States of America in the sum of fifteen hundred dollars ($1500.00), lawful money of the United States, to be levied on our goods and chattels, land and tenements, upon the following conditions:

THE CONDITION OF THIS OBLIGATION IS SUCH, that WHEREAS, the above-named defendant John Cvitkovich was on the 13th day of June, 1929, sentenced in the above-entitled court as follows:

Four (4) months in the county jail and a fine of two hundred fifty Dollars ($250.00) and costs.

AND WHEREAS, said defendant has sued out a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit to review said judgment,

AND WHEREAS, the above-entitled court has fixed the defendant's bond to stay execution of said judgment in the amount of fifteen hundred dollars ($1500.00).

NOW, THEREFORE, if the said defendant John Cvitzkovich pays the fine and costs and shall diligently prosecute said writ of error and shall render himself amenable to all orders which said Circuit Court of Appeals shall make or order to be made in the premises, and to all process issued or ordered to be issued by said Circuit Court of Appeals, and shall not leave the jurisdiction of this court without permission being first granted and shall render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, then this obligation shall be void, otherwise to remain in full force and effect.

JOHN CVITZKOVICH,
Principal.
By FRED C. BROWN,
His Attorney.

[Seal]
AMERICAN BONDING COMPANY OF BALTIMORE.
By BLANCHE RISING,
Attorney-in-fact.

Approved.

BOURQUIN, J. [22]

[Endorsed]: Filed Jun. 20, 1929. [23]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That this cause came on regularly for trial on this, the 12th day of June, 1929, before the Honorable George M. Bourquin, one of the Judges of the above-entitled court, sitting with a jury, duly empaneled and sworn; the plaintiff appearing by Anthony Savage and H. P. Dodd, Esqs., District Attorney and Assistant District Attorney, respectively; and the defendant appearing by Fred C. Brown, Esq., his counsel; whereupon the following testimony was offered and the proceedings had, as appears herewith by stipulation for counsel for the Government and the defendant, to wit: [24]

TESTIMONY OF H. E. DAGGETT, FOR THE GOVERNMENT.

H. E. DAGGETT, produced as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

That in August, 1928, he was a Federal Prohibition Officer and is still holding that position; that

on the 11th day of August, 1928, he visited the premises at 520 Jackson Street, which is a pool hall and soft drink place; that he entered there with another person and witness asked one John Kuchin if he could get a drink of whisky. John Kuchin replied to witness that he could if he had any money. Witness and the man who was with him, and John Kuchin went into a room in the rear and were served two drinks each of whisky for which he paid the sum of twenty-five cents (25¢) per drink.

That witness and his friend left and witness returned alone in the afternoon and met defendant, who served him one drink of whisky in the back room for which he paid twenty-five cents (25¢).

That on the 13th day of August, witness returned to said place with his brother and purchased from defendant another drink and paid defendant twenty-five cents (25¢).

Under cross-examination witness stated that he had had other drinks of liquor at other placed on the 11th and 13th of August. That he visited these premises only on these two occasions.

It was then stipulated in open court by the respective attorneys, that the defendant admitted that he was the defendant in counts three (3) and five (5) of the indictment.

Whereupon the Government rested. [25]

TESTIMONY OF JOHN CVITKOVICH, FOR DEFENDANT.

JOHN CVITKOVICH, the defendant, on behalf of himself, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

That his name was John Cvitkovich; that he denied that he sold any intoxicating liquor whatever to H. E. Daggett.

That the first time he ever saw Daggett was when he was produced as a witness on the witness-stand at the time of the trial. That he does not recall whether he was in Seattle in August, 1928, as some time in the latter summer of 1928 he was away from Seattle and at Cle Elum, Washington. That he denied that he ever sold any intoxicating liquor to any person at 520 Jackson Street at any time.

That he was arrested on Thanksgiving evening at 520 Jackson Street; that at that time there was no liquor on the premises and defendant had not committed any violation of law. That Federal Prohibition Officer Whitney and Federal Prohibition Officer Corvin came there with some man who had been arrested about a block away who had the possession of intoxicating liquor, and Mr. Corvin at that time put defendant under arrest.

He was then asked to relate the conversation between Mr. Whitney and Mr. Corvin in defend-

ant's presence. Whereupon the Court refused to allow the defendant to answer.

Whereupon counsel for defendant informed the Court that he did not like to make a statement in detail in the presence of the jury as to just the conversation between Mr. Whitney and Mr. Corvin, but in substance the evidence would show that Mr. Whitney made the statement that they had no case against defendant, and the answer of Mr. Corvin would show that there was no case against defendant up to that time. Whereupon the Court interrupted and stated that any conversation of Mr. Corvin was not admissible unless Mr. Corvin was a witness in behalf of the Government. [26]

Exception was taken and defendant was cross-examined by Mr. Dodd.

On cross-examination defendant admitted that he was not interested in, or the owner of the premises at 520 Jackson Street; that the proprietor, at the time of his arrest, had requested defendant to look after the place because he had to go out of town. That defendant, on a number of occasions, had worked around the place and did not know where he was in August, 1928.

The defendant rested.

The Government rested.

After argument of respective counsel the Court instructed the jury.

Jury retires.

IT IS HEREBY STIPULATED, by and between Anthony Savage, United States District At-

torney, by H. P. Dodd, Assistant United States District Attorney, on behalf of the United States District Attorney, and Fred C. Brown, attorney for the defendant, that the foregoing proceedings were the proceedings and evidence and offer made by the attorney for the defendant in the trial of the above case and is a true and correct statement of the evidence and proceedings during the course of the trial of the defendant in said action.

ANTHONY SAVAGE,
United States District Attorney.
By HAMLET P. DODD,
Asst. United States District Attorney.
FRED C. BROWN,
Attorney for Defendant. [27]

Settled as complete and correct.

BOURQUIN,
Judge.

[Endorsed]: Received a copy of the within bill of exceptions this 28th day of June, 1929.

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Lodged and also filed June 23, 1929. [28]

[Title of Court and Cause.]

PRAECIPE FOR PROCESS.

To the Clerk of the Above-entitled Court:

You will please record including (1) Indictment, (2) Verdict, (3) Judgment, (4) Motion for new

trial and affidavits and stipulation attached, (6) Exception to denial of new trial, (7) Petition for writ of error, (8) Assignment of errors, (9) Citation on writ of error, (11) Order allowing writ of error, (12) Bond on appeal, (13) Bill of exceptions.

[Endorsed]: Filed Jul. 1, 1929. [29]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 30, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [30]

Clerk's fees (Act Feb. 11, 1925), for making record, certificate or return, 40 folios at 15¢ $6.00

Certificate of Clerk to Transcript of Record with seal ..... .50

Total $6.50

I hereby certify that the above cost for preparing and certifying record, amounting to $6.50 has been paid to me by the attorney for appellant.

I further certify that I attach hereto and transmit herewith the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District this 8th day of July, 1929.

[Seal] ED. M. LAKIN,

Clerk U. S. District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [31]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear in session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office in the United States District Court for the Western District of Washington, Northern Division, wherein John Cvitzkovich is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against this defendant, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the party in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States for the Western District of Washington, this 20 day of June, 1929.

[Seal] BOURQUIN,
District Judge.

Received a copy of the within citation this 15 day of June, 1929.

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Filed Jun. 20, 1929. [32]

[Endorsed]: No. 5919. United States Circuit Court of Appeals for the Ninth Circuit. John Cvitzkovich, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed August 19, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5919

JOHN CVITKOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

Brief of Appellant

FRED C. BROWN,
Attorney for Appellant.

505 McDowall Building,
Seattle, Washington.

MARTIN & DICKSON, PRINTERS

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JOHN CVITKOVICH,

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Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

Brief of Appellant

STATEMENT OF THE CASE

The appellant was charged, by indictment, with several violations of the National Prohibition Act, the indictment containing six counts. The first count charged possession of Four (4) ounces of whisky on August 11, 1928.

The second charged possession of One (1) pint of whisky on August 11, 1928.

The third charged a previous conviction of the appellant on February 28, 1928, for possession of intoxicating liquor in violation of the National Prohibition Act.

The fourth charged the sale of Two (2) ounces of whisky on the 13th day of August, 1928.

The fifth charged previous conviction of the appellant on February 28, 1929, for the sale of intoxicating liquor in violation of the National Prohibition Act.

The sixth charged the maintenance, by the appellant, of a common nuisance at 520 Jackson Street, in the City of Seattle.

(Transcript, pages 2 to 6.)

On the trial the appellee produced a witness named H. E. Daggett, who testified that he was a Federal Prohibition Officer and that on the 11th day of August, 1928, he visited the premises at 520 Jackson Street, in the City of Seattle, which is a pool hall and soft drink place, and inquired of one John Kuchin if he could get a drink of whisky, and, being answered in the affirmative, purchased two drinks of whisky, one for himself and one for a friend who accompanied him. That later

in the afternoon of the same day he returned alone and met the appellant and purchased a drink of whisky from him and that on the 13th day of August, 1928, he purchased another drink of whisky from the appellant at the same place.

As a part of the Government's case in chief, it was stipulated in open court, by the attorneys for the respective parties, that the appellant had been previously convicted of possession and sale of intoxicating liquor in violation of the National Prohibition Act and was the same person referred to in Counts Three (III) and Five (V) of the indictment.

(Transcript, pages 19 and 20.)

The appellant was introduced as a witness in his own behalf and testified that he had never, at any time, sold any intoxicating liquor to the witness Daggett and that the first time he had ever seen the witness was when he was placed upon the witness stand as a witness for the Government. That he was arrested on Thanksgiving evening, 1928, at 520 Jackson Street, in the City of Seattle, and that at the time of the arrest no liquor was found upon the premises, although a search was made by the arresting officers, and it was not claimed that he was then guilty of any violation of the National Prohibition Act. That the arresting officers

were Federal Prohibition Officers Whitney and Corvin and at the time of the arrest it was suggested by Whitney to Corvin, in the presence and hearing of the witness, that the Government had no case against the appellant, to which Corvin responded that he intended to make one. This testimony was objected to by the attorney for appellee and the objection sustained, and an exception allowed. Thereupon, the attorney for appellant offered to prove these facts but the offer was rejected and an exception allowed, the trial judge stating that the evidence was not admissible because Corvin had not been called as a witness by the Government.

On cross-examination the appellant testified that he had no interest in the premises known as 520 Jackson Street or in the business conducted there and was present there at the time of his arrest temporarily while the owner was absent on an errand, and that while he had worked there occasionally in the past, he was unable to state whether he had worked there at any time during the month of August, 1928.

(Transcript, pages 21 and 22.)

After being instructed by the court on the law applicable to the case, the jury retired and thereafter returned a verdict finding the appellant guilty on all six counts of the indictment.

(Transcript, page 7.)

A motion for a new trial was interposed on behalf of the appellant and denied. In support of this motion an affidavit of the appellant was submitted to the court. In this affidavit the appellant set forth that he was arrested on the evening of November 27, 1928, at 520 Jackson Street, in the City of Seattle, by Federal Prohibition Officers Whitney and Corvin; that at the time of his arrest he did not have possession of any intoxicating liquor and Whitney remarked to Corvin that they had no case against him, and in response to that remark Corvin said, "Hell, I'll make a case against him," and that if permitted to testify he would testify to this conversation between the arresting officers and could produce a witness who also overheard the said conversation.

(Transcript, pages 9 and 10.)

At the time of the presentation of the motion for a new trial a stipulation in writing, entered into by the attorneys for the respective parties, was submitted to the trial judge reciting that while the appellant was a witness in his own behalf a question was propounded to him by his attorney which called for a conversation in his presence between Federal Prohibition Officer Whitney and Federal Prohibition Officer Corvin as to

what was said at the time of the arrest and that the court objected and refused to permit the witness to answer.

(Transcript, page 12.)

Thereafter the appellant was sentenced to pay a fine of Two Hundred Fifty Dollars ($250.00) and serve a period of four months in the county jail of Jefferson County, State of Washington.

(Transcript, page 8.)

From this judgment and sentence this appeal was taken.

ASSIGNMENT OF ERRORS

I.

That the District Court erred in refusing to permit the appellant to testify to the conversation between Federal Prohibition Officers Whitney and Corvin at the time of his arrest.

II.

The District Court erred in denying the appellant's motion for a new trial.

III.

The District Court erred in imposing sentence upon the appellant.

ARGUMENT

The sole question raised by this appeal is whether the appellant was entitled to introduce as original evidence, testimony tending to prove that the arresting officers, who were conceded to be prohibition agents of the United States, stated in the presence and hearing of the appellant and another person that the Government had no case against him for a violation of the National Prohibition Act, but that they intended to fabricate one.

The view entertained and expressed by the trial judge at the time of rejecting this testimony was that if Corvin had been called as a witness for the Government the questions could be propounded to him for the purpose of impeachment, but inasmuch as he had not been called as a witness the testimony was not available to the appellant as original evidence. In this the trial court was in error and the error was a prejudicial one in that it prevented the appellant having a fair trial.

As we view it, the evidence offered was admissible on two distinct grounds. In the first place, Whitney and Corvin were official agents of the appellee and all that they did or said in connection with the appellant's arrest and connected therewith was admissible as original evidence against the appellee.

The rule is clearly stated in 2 Whigmore on Evidence, Section 1078, as follows:

> "He who sets another person to do an act in his stead, as agent, is chargeable by such acts as are done under that authority, and so too, properly enough, is affected by admissions made by the agent in the course of exercising that authority."

It is quite generally held by the authorities that a prosecuting witness in a criminal case cannot make admissions which will be binding upon the state, but these holdings are based on the reason that there is no privity or legal entity between the prosecuting witness and the state in a criminal prosecution. This reason has no application to the present situation. Whitney and Corvin were official prohibition agents empowered by the Government, which could act only through its authorized officials, with the enforcement of the National Prohibition Act and in the discharge of their duties, their acts, statements and declarations became the acts, statements, and declarations of the Government itself.

In the second place, the evidence rejected by the trial court was admissible as a part of the *res jestae* of the arrest. All declarations and acts of parties to a given transaction, which are contemporaneous with and accompany it and are calculated to throw light upon the motives and intentions of the parties to it, are admissible as parts of the *res jestae.*

People vs. Mulvaney, 286 Ill. 114, 121 N. E. Rep. 229;

Fisk vs. U. S., 279 Fed. Rep. 17;

Nalls vs. State, 95 Southern Rep. 591 (Ala.);

Goff vs. State, 77 Southern Rep. 877 (Fla.).

The general rule is clearly stated in *People vs. Mulvaney,* supra, as follows:

> "Whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper also to show any accompanying act, declaration or exclamation which relates to or is explanatory of such fact or event. Such acts, declarations or exclamations, are known to the law as *res jestae.*"

Apply this well-established rule of law to the present case. It was important to show the fact of the appellant's arrest for a violation of the National Prohibition Act and this was done by the Government, together with the time, place, and the officials by whom that arrest was made. Consequently, it was competent and proper for the appellant to prove, as original evidence, any statement or declaration accompanying his arrest which related thereto and was explanatory of that fact or event.

The case of *Nalls vs. State,* supra, presented a situation almost identical with the instant case. There the arresting officers undertook a search of the defend-

ant's premises, and were annoyed by his attitude and, although having no legal ground therefor, placed him under arrest. In answer to a question from the defendant's wife as to why they had placed him under arrest, one of the arresting officers said, "We have no case against him but I'm going to send him to the rockpile for objecting to the search."

On the trial this evidence was offered and rejected by the trial judge, as in this case. On appeal the Supreme Court of Alabama held that the statement of the arresting officer made at the time of the arrest and in connection therewith, were admissible as part of the *res jestae.*

If it was important to show the arrest of the appellant in the present case it was equally important and competent to show anything that was said or done, either by the appellant or by the arresting officers of the Government in connection therewith, and the refusal of the trial judge to permit the introduction of the testimony offered resulted in a verdict adverse to the appellant. It is fair to assume that if the testimony tendered had been admitted the jury would have promptly acquitted the appellant on all counts of the indictment.

The possession and sale charged against appellant occurred on August 11 and August 13, 1928. No arrest was made at that time or within a reasonable time thereafter. Months later Agents Whitney and Corvin visited the premises known as 520 Jackson Street, and, finding no liquor as a result of their search, and no violation of the National Prohibition Act, placed the appellant under arrest. With the evidence in this state the jury would have promptly acquitted, if they had known of the conversation between Whitney and Corvin at the time of the arrest. Even the previous convictions of the appellant, which he admitted in open court, would not have been sufficient to overcome the evidence of a deliberately fabricated case of law violation.

We respectfully submit that this case should be reversed and a new trial ordered.

FRED C. BROWN,

Attorney for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5919

JOHN CIVITKOVICH, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLEE

ANTHONY SAVAGE,
United States Attorney.

HAMLET P. DODD,
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Attorneys for Appellee

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BRIEF OF APPELLEE

STATEMENT OF CASE

The appellant was charged, by indictment, with several violations of the National Prohibition Act, the indictment containing six counts. The first

count charged possession of four (4) ounces of whiskey on August 11, 1928. The second charged possession of one (1) pint of whiskey on August 11, 1928. The third charged a previous conviction of the appellant on February 28, 1928, for possession of intoxicating liquor in violation of the National Prohibition Act. The fourth charged the sale of two (2) ounces of whiskey on the 13th day of August, 1928. The fifth charged previous conviction of the appellant on February 28, 1929, for the sale of intoxicating liquor in violation of the National Prohibition Act. The sixth charged the maintenance, by the appellant, of a common nuisance at 520 Jackson Street, in the City of Seattle. (Tr. 2 to 6.)

On the trial, the appellee produced a witness named H. E. Daggett, who testified that he was a Federal Prohibition Officer and that on the 11th day of August, 1928, he visited the premises at 520 Jackson Street, in the City of Seattle, which is a pool hall and soft drink place, and inquired of one John Kuchin if he could get a drink of whiskey, and, being answered in the affirmative, purchased two drinks of whiskey, one for himself, and one for a friend who accompanied him. That later in the after-

noon of the same day he returned alone and met the appellant and purchased a drink of whiskey from him and that on the 13th of August, 1928, he purchased another drink of whiskey from the appellant at the same place, in company with his brother.

As a part of the Government's case in chief, it was stipulated in open court, by the attorneys for the respective parties, that the appellant had been previously convicted of possession and sale of intoxicating liquor in violation of the National Prohibition Act and was the same person referred to in Counts Three (III) and Five (V) of the indictment. (Tr. 19 and 20.)

The appellant was introduced as a witness in his own behalf—the absence of other witnesses was explained as being out of the country—and testified that he had never, at any time, sold any intoxicating liquor to the witness Daggett and that the first time he had ever seen the witness was when he was placed upon the witness stand as a witness for the Government. That he was arrested on Thanksgiving evening, 1928, at 520 Jackson Street, in the City of Seattle, as part of a general round-up of the neighborhood, and that at the time of the arrest no liquor

was found upon the premises, although a search was made by the arresting officers, and it was not claimed that he was then guilty of any violation of the National Prohibition Act. That the arresting officers were Federal Prohibition Officers Whitney and Corvin, and at the time of the arrest it was suggested by Whitney to Corvin, in the presence and hearing of the witness, that the Government had no case against the appellant, to which Corvin responded that he intended to make one. This testimony was objected to by the attorney for appellee and the objection sustained, and an exception allowed. Thereupon, the attorney for appellant offered to prove these facts but the offer was rejected and an exception allowed, the trial judge stating that the evidence was not admissible because Corvin had not been called as a witness by the Government.

On cross-examination the appellant testified that he had no interest in the premises known as 520 Jackson Street or in the business conducted there and was present there at the time of his arrest temporarily while the owner was absent on an errand, and that while he had worked there occasionally in the past, he was unable to state whether he had worked

there at any time during the month of August, 1928. (Tr. 21-22.)

After being instructed by the court on the law applicable to the case, the jury retired and thereafter returned a verdict finding the appellant guilty on all six counts of the indictment. (Tr. 7.)

A motion for a new trial was interposed on behalf of the appellant and denied. In support of this motion an affidavit of the appellant was submitted to the court. In this affidavit the appellant set forth that he was arrested on the evening of November 27, 1928, at 520 Jackson Street, in the City of Seattle, by Federal Prohibition Officers Whitney and Corvin; that at the time of his arrest he did not have possession of any intoxicating liquor and Whitney remarked to Corvin that they had no case against him, and in response to that remark Corvin said, "Hell, I'll make a case against him," and that if permitted to testify he would testify to this conversation between the arresting officers and could produce a witness who also overheard the said conversation. (Tr. 9 and 10.)

At the time of the presentation of the motion for a new trial a stipulation in writing, entered into by

the attorneys for the respective parties, was submitted to the trial judge reciting that while the appellant was a witness in his own behalf a question was propounded to him by his attorney which called for a conversation in his presence between Federal Prohibition Officer Whitney and Federal Prohibition Officer Corvin as to what was said at the time of the arrest and that the court objected and refused to permit the witness to answer. (Tr. 12.)

Thereafter the appellant was sentenced to pay a fine of Two Hundred and Fifty Dollars ($250.00), and to serve a period of four months in the county jail of Jefferson County, Washington. (Tr. 8.)

From this judgment and sentence, appeal was taken.

ASSIGNMENT OF ERRORS

I.

That the District Court erred in refusing to permit the appellant to testify to the conversation between Federal Prohibition Officers Whitney and Corvin at the time of his arrest.

II.

The District Court erred in denying the appellant's motion for a new trial.

III.

The District Court erred in imposing sentence upon the appellant.

ARGUMENT

No question can be raised as to the legal efficacy of the two rules of law cited by the appellant in the argument and on which his sole basis of reversal rests. The question raised by these rules is whether or not the actual facts in this case would warrant the application of the rules in the direction which he indicates. The first rule, that relating to agency, might be paraphrased as follows:

He (the Government) who sets another person to do an action in his stead, to-wit (Daggett) as agent, is chargeable by such acts as are done under that authority, so, too, properly enough, is affected by admissions made by the agent (Daggett) in the course of exercising that authority.

No evidence was introduced by the Government from any other witness than Daggett, and therefore, admissions made by any other persons than Daggett are not admissible as against the case of the Government. Yet the appellant seeks to bind the Government by statements made by Prohibition Agent-in-Charge Earl Corwin, who was present at the time of the arrest. Yet the facts and circum-

stances of the arrest were not introduced by the Government and form no part of the case in chief.

There is no such official, semi-official, or implied official connection between the Government and Agent Corwin which would make his statements binding as against the Government, or in any way controlling or affecting the testimony of Daggett in such a manner as to make his statements admissible as controverting the good faith, the fairness, or the position of Daggett, or the Government's case as a whole.

By the same implication the second argument, to-wit, that these remarks formed a part of the res jestae of the arrest must follow. The government introduced no testimony relative to the arrest whatsoever. The arrest, as the affidavit of the appellant himself will show, was part of the general clean-up prior to Thanksgiving in this District, and these remarks were made some little time after the direct physical arrest of the defendant and appellant. While the circumstances of the remarks may have been proper, they did not occur at such a time immediately at or during the arrest of the appellant as to form an actual part of the physical arrest and were so incidental to the testimony in chief as not to be even

introduced by the Government as a necessary part of the case, nor a part of the res gestae by appellant's own rule.

What the appellant is really seeking to do in this case is to impugn the good faith of the Government and show a scheme to "railroad" or unfairly prosecute this appellant by evidence which is clearly inadmissible and along which line there are no corroborating facts or circumstances other than a chance remark, according to appellant's claim, the truth or falsity of which has not been established. It was properly stricken as having no proper place in the testimony which should go to the jury, and no error was committed in denying this offer.

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney.

HAMLET P. DODD,
Assistant United States Attorney.

No. 5920

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOEL O'BRYANT,
Appellant,

v.

STATES STEAMSHIP COMPANY,
a Corporation,
Appellee.

Brief for Appellee States Steamship Company

ERSKINE WOOD,
Portland, Oregon,
McCUTCHEN, OLNEY, MANNON & GREENE,
San Francisco, California,
Proctors for Appellee.

C. H. FISH,
San Francisco, California,
Proctor for Appellant.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

No. 5920

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOEL O'BRYANT,
Appellant,

v.

STATES STEAMSHIP COMPANY,
a Corporation,
Appellee.

Brief for Appellee States Steamship Company

STATEMENT OF FACTS

This brief will be short, for there are no points of law to be discussed, and the facts are plain. A single reading of the testimony will, I am sure, convince the Court of the propriety of Judge Kerrigan's order dismissing the libel. And any extended discussion of the facts is therefore unnecessary.

The libelant claims he was hurt by falling down a ladder leading from the officers' deck to the well deck on the steamer "Pennsylvania" while on a return voyage from the Orient, on October 4, 1928. He blames his accident on the fact that the starboard handrail of the ladder had at the time been temporarily repaired in what he claims was an improper manner.

The truth appears to be that instead of falling down the ladder, he was injured in a drunken brawl with one or more members of the crew. The libelant was second assistant engineer. On the outward voyage to the Orient he appears to have behaved himself properly enough. But once in the Orient where liquor was available, he became a drunken, dissolute, quarrelsome, disobedient, half crazed renegade on the ship. He was drunk over considerable periods, was drunk while on duty, often so drunk that the chief engineer did not think it safe to permit him to go on duty and stood his watch himself in his place. He had frequent altercations and quarrels with various members of the crew, and they appear, as far as possible, to have avoided him and left him alone. He carried a gas pipe into the messroom and sat with it across his knees at table, a circumstance which he attempts to give an innocent explanation to but which his fellow officers construed as a threat against them, and the evidence seems fully to justify their fears. He actually was so regardless of the safety of the ship that he left his place of duty in the engine room and abandoned it while the ship was maneuvering under bells in the river at Shanghai. Practically the whole licensed personnel of the ship has testified against him to the foregoing facts,—a circumstance somewhat unique in these cases, in so many of which the men testify for each other, and the ship owner has often difficulty in presenting his case. The testimony of the officers who have testified against him is of course denied in large part by the

libelant, but considering his self interest in the case, the facts that he has himself been forced to admit are strong corroboration of the case against him. He has admitted deliberate disobedience on his part, of the captain's orders that he remain away from the crew's quarters aft (O'Bryant deposition, 35, 76); and has admitted that he refused to obey the orders of his immediate superior, the chief engineer, in regard to certain duties in the engine room (O'Bryant deposition, 66). He has admitted consorting with lewd Oriental women aboard the ship and contracting venereal disease from them.

He was hurt in the evening. In defiance of the captain's orders he had gone aft to the crew's quarters. The captain and chief engineer had gone there to order him forward. They found him drinking with the crew, and drunk, and after sending him forward, remained to search the crew's quarters for vodka. O'Bryant went staggering forward, unsteady in his gait. Shortly afterwards the first assistant engineer, Lucas, and the chief steward, Shorts, heard a fight and a scuffle and blows being struck and drunken curses on the officers' deck near the *top* of the ladder down which O'Bryant later claimed to have fallen. Lucas was at this time in the bath room. Shorts was in his own cabin. They didn't go out or attempt to interfere because O'Bryant was so thoroughly disliked on the ship that nobody cared whether he got beaten up or not. Shortly afterwards O'Bryant was found lying on the deck with his head in a small pool

of blood, six or eight feet away from the *top* of the ladder down which he says he fell.

The captain and the chief engineer came forward from the crew's quarters, the first assistant was also there, and after some objection on the part of the first assistant to touch O'Bryant at all, he and another man carried O'Bryant to his stateroom. O'Bryant was raving. The third officer, who was the man on board most versed in first aid remedies, attended to him, and washed and bandaged a cut on his head and put him to bed.

O'Bryant's own explanation of the accident is that he was sober when ordered forward by the captain from the crew's quarters. But after going to his room he remembered some clothes he had in a bucket in the bathroom which he wanted to wash, that he took that bucket and started down the ladder to get some boiler compound which he was going to use as a substitute for soap and which was kept on the deck below about ten or fifteen feet from the foot of the ladder, that he went down the ladder backwards, carrying the bucket in his left hand, and that his right hand slipped off the rail of the ladder due to its alleged defect, that he fell to the deck below, climbed up the ladder again and fell on the deck near the top of the ladder where he was found, lost consciousness and knew nothing until six o'clock next morning. That is his story. The ladder, we may add, was one of those slanting, half stairway—half ladder kind of affairs, made of iron and with a handrail on each side—the type so common on ships.

We ask the Court particularly to read at least the direct examinations of Captain Linnander, Chief Engineer Millich, First Assistant Engineer Lucas, Third Officer Joyce, Second Officer McCarty, Third Assistant Chuinard, Carpenter Sandberg and Chief Steward Shorts. We are convinced a single perusal of that testimony will dispose of the case and dispense with any necessity for extended argument on our part. Either the whole ship's company are egregious liars, or else O'Bryant is. And the weight of evidence is clearly with the ship's company. Judge Kerrigan, possibly because he did not want to stigmatize O'Bryant by describing him as he would have had to describe him had he written an opinion, dismissed the libel without opinion.

We may observe that even if O'Bryant's very improbable story be accepted as true, he could not recover anything in this case because the repair to the ladder was reasonably safe, it was perfectly obvious, and had been used by the whole crew frequently for days preceding this, and O'Bryant certainly knew, or at least ought to have known, exactly what it was like. The bathroom, which he says he used every day, was within fifteen feet of the head of this ladder, and the boiler compound which the engineers (and he was one of them) were using every twenty-four hours, was within ten or fifteen feet of the foot of the ladder. So that O'Bryant must have seen the ladder often every day, and probably often used it. He does not deny using it. He merely says he cannot recall. Ships at sea of course frequently have to make tem-

porary repairs. The risk of such is one of the ordinary risks a season assumes. There is not the slightest evidence that this repair was in any way negligent. But even if it was, he would have assumed the risk of it when it was open and apparent and obvious to him. I do not know what more the ship could have done for him, unless it had hung a red lantern on the ladder, or kept him locked up in his stateroom as unfit to be about the ship at all.

O'Bryant sued for $50,000.00. There is nothing small about him. The substance of the medical testimony was that his only injuries were a fracture of the spinal processes of the sixth and seventh cervical vertebrae. The spinal processes, as your Honors know, are the little bony spurs that project from the vertebrae. The fracture of them is not serious, and O'Bryant completely recovered.

He also included in his complaint a claim for $11.00 wages wrongfully, as he claims, deducted from him when he was paid off at San Francisco. And he also claims wages from San Francisco to Portland, Oregon. The fact is that he was paid off before the United States Shipping Commissioner and signed a release before the Commissioner in the usual way. He was paid off by mutual consent because he wanted to go to the hospital in San Francisco.

At the trial his proctor asked leave to amend the libel by including a third claim, namely, damages for maltreatment by the captain in forcing O'Bryant to go back to work after his injury. This claim is that O'Bryant was forced to return to the performance of

his duties about two days after his injury under threat of stopping his pay if he did not so go back to work, and that the captain should have known that going back to work would aggravate the injuries. We observe here, parenthically, that there was no force used to make him go back to work—merely a warning that if he did not, his wages would be stopped. This, in any light, is hardly maltreatment. This amendment was requested long after the ship's depositions were taken, and of course the ship had no opportunity to meet it by testimony. The request was only made at the opening of the trial. After first objecting, we ultimately consented to the allowance of the amendment, feeling that if we did not do so, libelant's proctor might at some subsequent time file a new and different libel on this claim as a new and separate cause of action. We do not know whether he could have or not, but rather than run that risk, we consented to the amendment. We did this because we felt that the claim practically refuted itself. To hold the ship owner responsible for any such thing as that, it would have to appear that the captain knew, or as a reasonable man should have known, that these spinal processes on the vertebrae were broken, and that it would injure O'Bryant to return to work. The doctors, however, have testified that his returning to the performance of his duties did not prevent his permanent recovery, though it may have caused him some pain. And as to the other phase of it, it must be obvious to this Court that an ordinary sea captain could hardly be expected to diagnose

O'Bryant's case and decide that he should not go back to work when it took expert doctors and X-rays in San Francisco to determine that anything was the matter with O'Bryant at all. O'Bryant's conduct had fully justified the captain in believing, which was the fact, that he was a rebellious member of the crew, unwilling to perform his duties, and using the accident as an excuse for not doing so.

Respectfully submitted,

ERSKINE WOOD,
Proctor for Appellee.

No. 5921

United States

Circuit Court of Appeals

For the Ninth Circuit.

KAICHIRO SUGIMOTO,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:

Messrs. BIANCHI & HYMAN, Kohl Bldg., San Francisco, Calif.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

District Court of the United States, Northern District of California, Southern Division.

Clerk's Office.

No. 20,006–K.

KAICHIRO SUGIMOTO, on Habeas Corpus,

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue transcript of record on appeal and include the following papers:

1—Petition for habeas corpus.

2—Supplement and amendment to petition for writ of habeas corpus.

3—Memorandum of opinion.

4—Petition for allowance of appeal.

5—Assignment of errors.

6—Order allowing appeal and fixing cost bond.
7—Cost bond.
8—Citation on appeal.

A. B. BIANCHI,
JOSEPH LEO HYMAN,
Attorneys for Appellant.

[Endorsed]: Filed Jul. 16, 1929. [1*]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 20,006–K.

In the Matter of KAICHIRO SUGIMOTO, Restaurant Keeper, Rtg. SS. "Siberia Maru," 3/30/29.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge Now Presiding in the Above-entitled Court:

The petition of Kaichiro Sugimoto, who is hereinafter in this petition referred to as the "detained," respectfully shows and alleges, by and through his wife, Mrs. Yone Sugimoto, as follows:

I.

That the petition and application is made by the "detained's" next friend and relative, his wife;

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*Page-number appearing at the foot of page of original certified Transcript of Record.

that said parties were married on the 2d day of October, 1924, at Susuin, California, and they ever since have been, and now are, husband and wife; that the reason said wife verifies and makes this petition is that she has knowledge of all the facts, and further that this petition must be filed this day; that she is informed by the Commissioner of Immigration at the United States Immigration Station at Angel Island that the "detained" is to be returned to Japan and/or Hawaii on a steamer sailing on or before 12 o'clock noon May 8, 1929; that the first opportunity afforded petitioner or her attorneys to see the record of the Immigration Service was at approximately 11 o'clock A. M., May 7, 1929; that there was not sufficient time to prepare the petition and take the same to Angel Island to the detained for his signature. [2]

II.

That the detained is unlawfully imprisoned, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration for the port of San Francisco, at the United States Immigration Station at Angel Island, County of Marin, within the Southern Division of the United States District Court, in and for the Northern District of California, through the Secretary of Labor, J. H. Davis, who is about, and threatens, to convey the "detained" upon a ship departing from San Francisco to Japan on May 8, 1929;

III.

That the cause of said imprisonment, detention

or deportation is that the said "detained" has not established his right to enter the United States in conformity with the Immigration Act of 1924, and that he is held subject to being deported, as aforesaid, by the secretary of the Department of Labor under the following orders as more particularly herein appears; that *detention* is being excluded on the following finding made by the Board of Special Inquiry, which same are in words and figures as follows, to wit:

"BY CHAIRMAN:—This applicant is applying for admission as a Returning Restaurant Keeper, under Sec. 4 (b) of the Act of 1924, and presented a Non-Quota Visa No. 365, dated at Yokohama, March 12, 1929, and a Japanese Passport showing him to be returning to the U. S. from a temporary visit abroad. SUGIMOTO, KAICHIRO, stated that he was admitted to Hawaii July 29, 1907, ex SS. 'NIPPON MARU' and his statement has been verified by the records of the Honolulu Office of this Service. Applicant has also stated that he came from Honolulu to the mainland on the SS. 'ALAMEDA' in July 1907. He, however, admitted that the latter statement is not true; that he in reality came to the U. S. on a freighter, name [3] unknown; that he paid $60 to a Japanese hotel man in Honolulu for the privilege of being a stowaway, and was smuggled into the U. S. through this port from the said freighter in August, 1907. SUGIMOTO, KAICHIRO has testified that he remained in the U. S. continuously from 1907 or about

twenty-one years, until July 18, 1928, when he departed for Japan for a visit from which he is now returning. Applicant's long residence in the U. S. is verified by the statements of several persons who were interviewed by Inspector Davis of this Service. (See his report of April 6, 1929.) Applicant has a wife and two American-born children living in San Francisco, where is a proprietor of a restaurant. He is literate and has been medically released by the Medical Examiner of Aliens at this Station, showing that portion of the letter written to this Service by 'K. YAMAKWA' relating to Applicant's health to be untrue.

This applicant is returning from a temporary absence abroad, after having lived in the U. S. continuously for approximately 21 years, and is therefore entitled to have his case brought to the attention of the Department under the Seventh Proviso of Sec. 5 of the Act of 1917.

I move the applicant be excluded from this country and deported to Japan, the country from which he came, upon the ground that he entered the U. S. from Hawaii subsequent to Feb. 20, 1907, and was a Laborer, not in possession of a passport entitling him to enter the U. S. I move he be excluded on the further ground that he has not sustained the burden of proof as required by Sec. 23 of the Act of 1924.

By Member AUSTIN.—I second the motion.

By Member GOURSELL.—I concur." [4]

"Applicant is called before the Board.

Interpreter: Mrs. E. J. AUSTIN.

CHAIRMAN to APPLICANT.—You are informed that this Board has excluded you from admission to the U. S. on the ground that you entered the U. S. subsequent to Feb. 20, 1907, from Honolulu; that you were not in possession of a passport permitting you to enter this coun*tr*; the burden of proof is upon you to prove that you have been le*a*gally admitted to the U. S. and you have failed to sustain that requirement of the law. You are therefore excluded and ordered deported to the country whence you came. You are advised that this decision is not final, that you have the right of appeal to the Secretary of Labor, Washington, D. C., which appeal will cost you nothing, and that you will be given 48 hours in which to give notice of such appeal.

Q. Do you wish to appeal?

A. Yes, I wish to appeal.

Q. On what ship did you come?

A. SS. 'Siberia Maru' of N. Y. K. Line.

Q. You are further advised that if deported it will be at the expense of the steamship company which brought you to this country, which must furnish you with quarters equal to those occupied by you on the vessel by which you arrived.

Q. How did you come?

A. Second cabin, from Yokohama, Japan.

Q. What were your expenses for transportation?

A. $150. American currency.

Q. In the event you are deported and the steamship company fined for bringing you here, that portion of the fine which represents the passage money from the port of embarkation to this port should be sent to you at what foreign address?

A. Send to my wife at 1772 Sutter Street, San Francisco, Calif. [5]

Q. Any money collected for you from the steamship company must be sent to your foreign address after your deportation by check by the Collector of Customs.

A. I understand."

That said findings and order last referred to were made on April 8, 1929; that thereafter "detained" appealed to the Secretary of Labor; that the said Secretary of Labor affirmed the excluding decision of the Board of Special Inquiry with the proviso, however, that the "detained" was given permission to voluntarily "deport" himself, at his own expense, to Hawaii in lieu of the deportation prescribed by the Board of Special Inquiry; that said findings and order of the Secretary of Labor have not yet arrived at the Immigration Station aforesaid, except that a telegraphic report thereof has arrived at said station, and that said telegraphic report is in words and figures as follows, to wit:

"Washington, D. C., May 3, 1929.

Department affirmed exclusion Kaichiro Sugimoto (stop) Permission granted deported voluntarily own expense to Hawaii in lieu deportation."

IV.

That the said "detained" is not imprisoned or restrained by virtue of any official order or process or decree of any court; that the said imprisonment and detention are illegal and without authority of law for the following reasons:

(a) That the said "detained" is applying for admission as a returning restaurant keeper under Sec. 4 (b) of the Immigration Act of 1924 and presented a Non-Quota Visa No. 365 had at Yokohama, Japan, March 12, 1929, and a Japanese Passport showing him to be returning to the United States from a temporary visit abroad; [6]

(b) That the said "detained" was previously lawfully admitted at Honolulu, Territory of Hawaii, on, to wit, the 29th day of July, 1907, ex SS. "Nippon Maru"; that at said time the said Territory of Hawaii was, and ever since has been, a part of the United States;

(c) That said "detained," Kaichiro Sugimoto, has ever since been, and continuously during said time, a resident of the United States of America, save and except that he did depart therefrom for a temporary visit abroad on the 18th day of July, 1928, at which time he went to Japan, returning from said temporary visit on the 30th day of March, 1929, ex SS. "Siberia Maru" to the port of San Francisco; that he has ever since said time been detained at Angel Island;

(d) That the said "detained" is now, and was prior to his leaving on said temporary visit, and

for many years prior thereto, the owner and keeper of a restaurant, and during said time he was not, and is not now, a laborer skilled or unskilled; that he is married, has a wife and two children and three stepchildren, all residing in the City and County of San Francisco, State of California, and dependent upon him for support;

(e) That the exercis*al* of his election or option, under the order of the Secretary of Labor, to voluntarily depart for the Territory of Hawaii is a vain and useless act; that it would necessitate expenditures to and from said Territory; that if said detained should depart voluntarily for the Territory of Hawaii he would, and intends, to immediately return to his family and business at the City and County of San Francisco, State of California, as one who is not a laborer skilled or unskilled. [7]

V.

That the Secretary of Labor has no authority in law or jurisdiction to order in any manner whatsoever or enforce the removal and deportation of the "detained" to Japan, or to prevent his return from the Territory of Hawaii to San Francisco in the event of his election to deport voluntarily for said Territory, and that the said Secretary of Labor had no proof whatsoever to show or justify the conclusion that the said "detained" was not entitled to land as one returning from a temporary visit abroad.

VI.

That all of the matters of fact set forth in the

foregoing paragraph are found and contained in the record of the Board of Special Inquiry hereinbefore referred to and are undisputed; that in addition thereto, the said record shows that the said "detained" is of good moral character and in every way admissible under the Immigration Laws of 1917; that the original record, or a copy thereof, is, on account of the shortness of the time, not available for the purpose of setting out *verbatim* herein, but in this respect petitioner stipulates that the record of the Immigration Service and/or Secretary of Labor in connection herewith may be admitted as a part hereof or otherwise, and she prays that if it becomes necessary that she be allowed, by amendment later, to furnish a *verbatim* copy thereof.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein directed to the said Commissioner of Immigration commanding him to produce the body of said detained, and setting forth the time and cause of his detention before your Honor at a time and place to be therein [8] specified, to the end that the cause of detention of said "detained" may be inquired into, and that he be relieved of restraint and discharged from custody without delay, or that in lieu thereof there issue from this Honorable Court an order to show cause, if any, why said writ should not be granted and said "detained" discharged, and that pending the hear-

ing of said order to show cause the said Commissioner of Immigration do nothing in the premises.

YONE SUGIMOTO,
Petitioner.

A. B. BIANCHI,
JOSEPH LEO HYMAN,
Attorneys for Petitioner. [9]

United States of America,
Southern Division of the Northern
District of the State of California,
City and County of San Francisco,—ss.

Yone Sugimoto, being first duly sworn, deposes and says:

That she is the petitioner named in the foregoing petition; that the same has been read and explained to her and that she knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters she believes it to be true.

YONE SUGIMOTO.

Subscribed and sworn to before me this 7th day of May, 1929.

[Notary Seal] M. V. COLLINS,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within petition for writ of habeas corpus is hereby admitted this 7th day of May, 1929.

_____,

United States District Attorney for the Commissioner of Immigration.

Filed May 7, 1929. [10]

[Title of Court and Cause.]

SUPPLEMENT AND AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge Now Presiding in the Above-entitled Court:

It is respectfully shown:

FIRST: That on the 7th day of May, 1929, a petition and application for a writ of habeas corpus was made by Mrs. Yone Sugimoto, the petitioner therein, for and on behalf of the detained, her husband, namely Kaichiro Sugimoto, and that said petition was on said date filed in the court above entitled; that upon said petition, duly verified, an order to show cause was made and granted, directing the Commissioner of Immigration at Angel Island to show cause, if any he has, why a writ of habeas corpus should not be granted and the detained therein mentioned discharged.

SECOND: That at the time of the filing of said petition there had not been received from the office of the Secretary of Labor, at Washington, D. C., nor was there available to the petitioner, the de-

tained, or their attorneys, all or any part of the original record of the Secretary of Labor, or any copy thereof; and that, accordingly, the petitioner therein, by and through her attorneys, prayed therein that they be allowed by amendment to furnish a *verbatim* copy of the [11] whole or any part thereof.

THIRD: That since the filing of said petition, the whole record has been forwarded from the office of the Secretary of Labor, Washington, D. C., to the City and County of San Francisco, State of California, and there become available to the detained, your petitioner, and their attorneys; that therefore and in conformity with the rules of the court above entitled, and by way of amendment and supplement to the petition herein referred to, the said detained and the said petitioner, by and through their attorneys, do herein and following set forth a *verbatim* copy of the findings, decision and opinion of the Secretary of Labor and the office thereof:

"55663/591—San Francisco. May 2, 1929.

In re: KAICHIRO SUGIMOTO, 40.

This case comes before the Board of Review for further consideration on appeal.

Presiding: Messrs. Winnings, Finucane and D. S. White.

Attorney Roger O'Donnell heard May 2, 1929.

This record relates to a 40 year old male native and subject of Japan who arrived at the port of San Francisco on March 30, 1929. Claims to have

been in the United States from July, 1907, until July 18, 1929; destined to wife, two children and three stepchildren; intends to remain permanently. Presents non quota immigration visa granted as a returning resident by the American Consul at Yokohama on March 12, 1929.

Excluded as an alien ineligible to citizenship (alien not having established that he was previously lawfully admitted to this country and entitled to the non quota immigration [12] visa he presents.) The excluding decision was affirmed by the Department April 22, 1929.

Attorney requests admission and calls attention to case 55622/335, where a Japanese lawfully admitted to Hawaii proceeded to the Mainland subsequent to the President's Proclamation of 1907 but where there was no record of such admission to the Mainland and nevertheless was admitted upon presentation of a non quota immigration visa on the theory that having been lawfully admitted to Hawaii, which is a part of the U. S. as defined in the Immigration Act of 1924, he is entitled to return to the Mainland.

This view is now held to be erroneous. Aliens admitted to Hawaii, who were not lawfully admitted to the Mainland after the President's Proclamation, are regarded as not having been admitted to all of the United States but are merely entitled to a limited admission, that is to Hawaii. The alien, therefore, is not entitled to a non quota visa to return to the Mainland as he was never previously lawfully admitted to the Mainland.

As an alternative request it is asked that the alien be permitted to return to Hawaii. Since he was lawfully admitted there and had a non quota immigration visa at the time of arrival at San Francisco, there is no objection to permitting him to resume a residence in Hawaii.

It is recommended that the request for outright admission be denied and that the excluding decision stand but that in lieu of deportation under the outstanding exclusion order alien be granted permission to depart voluntarily at his own expense to Hawaii, and that Honolulu be informed that the alien presented a valid non quota immigration visa at the time of his arrival at San Francisco, and if otherwise admissible, except as an immigrant not in possession of a non quota immigration visa Honolulu be authorized to admit him upon his arrival. [13]

L. PAUL WININGS,
Chairman Secy. & Comr. Gen's.
Bd. of Review.

TGF/VBE.

So ordered.

PETER F. SNYDER,
Asst. to Secy.

55663/591—San Francisco, May 1, 1929.

In re: KAICHIRO SUGIMOTO, 40.

This case comes before the Board of Review for further consideration on appeal.

Presiding: Messrs. Winings, Finucane and D. S. White.

Attorney Roger O.'Donnell heard April 15, 1929.

This record relates to a 40-year old male native and subject of Japan who arrived at the port of San Francisco on March 30, 1929. Claims to have been in the United States from July, 1907, until July 18, 1929; destined to wife, two children and three step-children; intends to remain permanently. Presents non quota immigration visa granted as a returning resident by the American Consul at Yokohama on March 12, 1929.

Excluded as an alien ineligible to citizenship (alien not having established that he was previously lawfully admitted to this country and entitled to the non quota immigration visa he presents.) The excluding decision was affirmed by the Department April 22, 1929.

The alien was admitted to Hawaii on July 29, 1907, which admission is verified. While he first claims to have proceeded to this country in a regular manner, he later admitted that he came on a Freighter and paid $60.00 to be brought to this country as a stowaway. Therefore, it appears that he was not regularly admitted to the Mainland. [14]

Attorney contends that although the President's Proclamation prohibiting entry to this country of Japanese laborers who had passports limited to Mexico, Canada or Hawaii, was issued on March 14, 1907, the alien was not excludable until after the Gentleman's Agreement was entered into which attorney states was some time in January, 1908.

The Proclamation itself, based upon authority

granted the President under the Act of February 20, 1907, need no treaty or other agreement to put it into force and effect. The alien appears to have been a laborer at the time of his arriva*n* in Hawaii. Since it is admitted he proceeded to the Mainland after the President's Proclamation, as he admitted he entered the Mainland illegally, and as at the time of his entry he was required to undergo inspection and examination, and was of a class prohibited from admi*tt*ion, he is an alien who was not previously admitted to continental U. S.

Although he was admitted to Hawaii, he has no right to proceed to any other part of the United States. The alien, therefore, is not entitled to the non quota immigration visa he presents.

It is recommended that the excluding decision be affirmed.

TGF/VBE.

L. PAUL WININGS,
Chairman, Secy. & Comr. Gen's Bd. of Review.

So ordered.

W. N. SMELSER,
Assistant to Secy."

FOURTH. That the said supplements and amendments are proposed, offered and filed by the said petitioner, for and on behalf of said detained; that the verification of and to said supplement and amendments is made by A. B. Bianchi, [15] one of the attorneys for petitioner, who has full knowledge of all the facts and matters stated in said amendments and supplement.

WHEREFORE, it is prayed that the foregoing be made a part of and considered a supplement and amendment to the petition herein referred to.

YONE SUGIMOTO,
Petitioner.

BIANCHI & HYMAN,
Attorneys for Petitioner. [16]

United States of America,
Southern Division of the Northern
District of the State of California,
City and County of San Francisco,—ss.

A. B. Bianchi, being first duly sworn, deposes and says: That he is an attorney-at-law, admitted to practice before all of the courts of the State of California and the court above entitled; that he is one of the attorneys for the petitioner and the detained mentioned in the foregoing amendments and supplement, and that he has read the foregoing supplement and amendment to petition for writ of habeas corpus and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

A. B. BIANCHI.

Subscribed and sworn to before me this 29th day of May, 1929.

[Notary Seal] M. V. COLLINS,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Service and receipt of a copy of the within supplement and amendment to petition for writ of habeas corpus is hereby admitted this 29th day of May, 1929.

GEO. J. HATFIELD,
United States District Attorney.

Filed May 29, 1929. [17]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 5th day of July, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—JULY 5, 1929—ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, ETC.

It is ordered that the petition for writ of habeas corpus heretofore submitted herein be and the same is hereby denied and the proceedings dismissed in accordance with memorandum opinion this day filed. Further ordered that the execution of the aforesaid order be and the same is hereby stayed for the period of five days. [18]

[Title of Court and Cause.]

Before KERRIGAN, District Judge.

July 5, 1929.

BIANCHI & HYMAN, of San Francisco, Calif., Attorneys for Petitioner.

GEORGE J. HATFIELD, United States Attorney, and H. A. VAN DER ZEE, Assistant United States Attorney, Both of San Francisco, Calif., Attorneys for Respondent.

MEMORANDUM OPINION.

This is a petition for a writ of habeas corpus on behalf of Kaichiro Sugimoto, a Japanese. The petition shows that he was admitted to Hawaii July 29, 1907, and that shortly thereafter he stowed away on a freighter on which he came to the mainland, where he was smuggled ashore at San Francisco. He remained here until July 18, 1929, when he departed for Japan. He returned to San Francisco this year, presenting a Japanese passport bearing a nonquota immigration visa granted him as a returning resident by the American Consul at Yokohama on March 12, 1929, and has been excluded by the Board of Special Inquiry. This decision has been affirmed by the Board of Review, with permission, however, to return to Hawaii, where he was lawfully admitted in 1907, in lieu of deportation to Japan. [19]

The findings of the Board of Special Inquiry show detained to have a wife and several American-born children living in San Francisco, where he is the proprietor of a restaurant. He is also found to be literate, and in sound physical condition. The Board further finds that he was a laborer at the time of his arrival on the mainland in 1907.

The exclusion order is upon the ground that Sugimoto is not "an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad" (Immigration Act of 1924, Sec. 4 (b); 8 U. S. C. A., Sec. 204 (b)), in that he has not sustained the burden of proof as to his lawful admission to the United States previously to the present application for admission.

The pertinent statutory provision applicable to Sugimoto's original entry to the continental United States is as follows:

> "Whenever the President shall be satisfied that passports issued by any foreign Government to its citizens or subjects to go to any country other than the United States, or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holder to come to the continental territory of the United States to the detriment of labor conditions therein, the President shall refuse to permit such citizens or subjects of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular

possession or from the Canal Zone": (8 U. S. C. A., Sec. 136 (h).) [20]

In accordance with this section, which was part of the Immigration Act of 1907, by Presidential Proclamation of Mar. 4, 1907, Japanese laborers with passports for Hawaii were excluded from the mainland, and this exclusion continues under the Presidential Proclamation of February 24, 1913. In the summer of 1907, therefore, when Sugimoto came to the mainland, his entry if he was a laborer, was unlawful.

Akira Ono vs. U. S., 267 Fed. 359.

The petition does not directly attack the finding that Sugimoto was a laborer in 1907 when he came to the mainland, but alleges that he has not been a laborer at any time since his entry. Of course, it is his status at the time of entry, and not that subsequent to entry which controls (Tulsidas vs. Insular Collector, 262 U. S. 258), and he has not sustained the burden of proof imposed upon him by Sec. 23, Immigration Act of 1924 (8 U. S. C. A., Sec. 221), as to a showing that he was not a laborer at the time of his surreptitious entry.

But it is urged on behalf of the alien that the illegality of his entry to the mainland in 1907 is immaterial, in view of his lawful entry and admission to Hawaii. This contention is based upon the definition of "United States" in sec. 28 (a), Immigration Act of 1924 (8 U. S. C. A., sec. 224a), which reads as follows;

> "(a) The term 'United States,' when used in a geographical sense, means the States, the Territories of Alaska and Hawaii, the District of Columbia, Porto Rico, and the Virgin Islands; and the term 'continental United States' means the States and the District of Columbia"; [21]

It is argued in effect that the inclusion of Hawaii in this definition permits an alien lawfully admitted to Hawaii to establish his residence anywhere else in the United States, including the mainland, and to go and come from that residence, on temporary visits abroad, basing his right to re-enter on the primary admission to Hawaii.

The difficulty with this argument is that, whatever the rule might be with regard to aliens of other nationalities, in the case of Japanese laborers the lawful admission to Hawaii is a restricted admission and, under the Presidential Proclamations, does not carry with it the right to admission to the mainland. The Immigration Act of 1924 is expressly stated to be in addition to and not in substitution for the provisions of the immigration laws (Sec. 25; 8 U. S. C. A., sec. 223). The labor provisions of the Immigration Act of 1907, (*supra*), *nad* the Presidential Proclamations thereunder are therefore still operative. A Japanese laborer, although lawfully admitted to Hawaii, is still barred from entry to the mainland.

This being true, Sugimoto is in no better position with regard to his right of entry to the mainland

then he would have been in 1907. No right of reentry can be predicated upon residence in the United States established following unlawful entry. Hurst vs. Nagle, 30 Fed. (2d) 346. Accordingly, Sugimoto would not be *i*ntitled to admission to the continental United States a nonquota immigrant under Sec. 4 (b) of the Immigration Act of 1924.

But it is further contended that, assuming that he is not entitled to admission under the above section, he is nevertheless entitled to admission under Sec. 3 (6) of the [22] same Act (8 U. S. C. A., sec. 203 (6)), as he is not now a laborer. By this section admission as a nonimmigrant is accorded to "an alien entitled to enter the United States solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation." By an Executive Order of July 12, 1926, such nonimmigrants must present visaed passports. The State Department is authorized to make regulations to carry the order into effect. Accordingly, the State Department has directed consular officers as follows, with respect to visas under Sec. 3 (6) Act of 1924:

> "In order to obtain a visa under the statutory and treaty provisions referred to the applicant must show that he is going to the United States in the course of a business which involves, substantially trade or commerce between the United States and the territory stipulated in the treaty. For example, one going to the United States as a member or agent of

a commercial concern in his own country, in transactions involving commerce between the two countries, or one going to the United States with a stock of goods produced in his own country, to be sold in the United States and to be replenished from other goods produced in his own country, would be entitled to the benefits of the statutory and treaty provisions in question.

The distinction to be observed is between the case of one engaged in trade or commerce between the two countries and the case of an immigrant or settler who seeks to come without such a relation to commerce, but who may thereafter engage in purely local transactions which lie outside the purposes of the commercial treaties." [23] (General Instruction Circular, No. 926, Department of State, Secs. 58, 59, pp. 16, 17.)

The petition in this case alleges:

(IV. e) "That the exercisal of his election or option, under the order of the Secretary of Labor, to voluntarily depart for the Territory of Hawaii is a vain and useless act; that it would necessitate expenditures to and from said Territory; that if said detained should depart voluntarily for the Territory of Hawaii he would, and intends, to immediately return to his family and business at the City and County of San Francisco, State of California, as one who is not a laborer skilled or unskilled."

Inferentially, this is intended to be a claim of right to enter under Sec. 3 (6), and I am asked to hold in effect that Sugimoto is entitled to admission under this section and to disregard the absence of the required consular nonimmigrant visa from his passport. In certain instances where the right of the alien to a visa is clear the courts have led that the alien will not be excluded merely because of the necessity of what amounts to a clerical correction. Re Spinella, 3 Fed. (2d) 196; Ex parte Seid Soo Hong, 23 Fed. (2d) 847. But in the present case it would appear that Sugimoto, who, as a restaurant keeper, would engage in purely local transactions, could not be granted a consular visa as a nonimmigrant (See Instruction, *supra*), and could not be admitted under Sec. 3 (6).

For the reasons above set forth, the petition for a writ of habeas corpus in this case does not set forth grounds for relief, and the petition will be denied and dismissed.

KERRIGAN,
U. S. District Judge. [24]

[Endorsed]: Filed. Jul. 5, 1929. [25]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable FRANK H. KERRIGAN, District Judge of the Above-entitled Court:

The above-named Kaichiri Sugimoto, being ag-

grieved by the order made and entered in the above-entitled cause on the 5th day of July, 1929, denying to him a writ of habeas corpus and dismissing the petition, therefore does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and therefore prays that this appeal be allowed and that citations be issued, as provided by law, and that a transcript of the records, proceedings and documents upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner prays further that the proper order prescribing the security for payment of costs on appeal, required to perfect the same, be made.

Dated: San Francisco, California, July 10, 1929.

A. B. BIANCHI,
JOSEPH LEO HYMAN,
Attorneys for Petitioner and Appellant. [26]

[Endorsed]: Service and receipt of a copy of the within assignment of errors is hereby admitted this 10th day of July, 1929.

GEO. J. HATFIELD,
Attorney for Respondent.

Filed Jul. 10, 1929. [27]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the petitioner in the above-entitled cause, by his attorneys, A. B. Bianchi, Esquire, and Joseph Leo Hyman, Esquire, and finds that the order entered in the above-entitled cause on the 5th day of July, 1929, denying him a writ of habeas corpus and dismissing the petition for same, is erroneous and unjust to the petitioner, and he specifies and assigns the following errors upon which he will rely in his appeal to the United States Circuit Court of Appeals, Ninth Circuit, from the aforementioned order herein:

1. That the said District Court erred in dismissing the petition and refusing to issue a writ of habeas corpus, as prayed;

2. That the said District Court erred in holding and deciding that the said Kaichiro Sugimoto was not entitled to a writ of habeas corpus, directed to the Commissioner of Labor, and directing that he, the said detained, be relieved of restraint and discharged from custody forthwith and without delay;

3. That the said District Court erred in holding and deciding that the said Kaichiro Sugimoto was not entitled to admission to the United States as an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad; [28]

4. That the said District Court erred in holding

and deciding that the said Kaichiro Sugimoto was not at the time he sought admission an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad, as the same is defined in that certain Federal act and statute known and designated as the Immigration Act of 1924, and particularly Section 4 (b); 8 U. S. C. A., Section 204 (b) thereof;

5. That the said District Court erred in holding and deciding upon the basis that the said petitioner and detained had not sustained the burden of proof as to his previous lawful admission into the United States; the admission to the United States, as defined in Section 28–a of the Immigration Act of 1924 (8 U. S. C. A., Sec. 224–a), being established and admitted;

6. That the Court erred in holding and deciding that the petitioner could not again return to the Continental United States if he voluntarily departed for Hawaii;

7. That the Court erred in holding and deciding that the Immigration Act of 1924, Section 28–a thereof, did not apply to the petitioner's present application for admission;

8. That the Court erred in holding and deciding that the petitioner could not be readmitted under the Immigration Act of 1907 or the Immigration Act of 1917.

WHEREFORE, the petitioner prays that the afore-mentioned order of the Southern Division of the United States District Court for the Northern

District of California, made and entered herein on the 5th day of July, 1929, denying said petitioner a writ of habeas corpus and dismissing his petition for same, be reversed and that this cause be remanded [29] to the United States District Court, with directions to issue a writ of habeas corpus to your petitioner herein, or such other relief as to said Circuit Court of Appeals for said district shall seem just.

Dated: San Francisco, Calif., July 10, 1929.

A. B. BIANCHI,
JOSEPH LEO HYMAN,
Attorneys for Petitioner.

[Endorsed]: Service and receipt of a copy of the within assignment of errors is hereby admitted this 10th day of July, 1929.

GEO. J. HATFIELD,
Attorney for Respondent.

Filed Jul. 10, 1929. [30]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING COST BOND.

The petition of Kaichiro Sugimoto for an appeal from the order of the above-entitled court, made and entered herein on the 5th day of July, 1929, denying said petitioner a writ of habeas corpus and dismissing the petition, is granted, and the appeal

allowed upon the giving of a bond, conditioned as required by law, in the sum of Two Hundred Fifty Dollars ($250.00).

Dated: San Francisco, California, July 10, 1929.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Service and receipt of a copy of the within order is hereby admitted this 10th day of July, 1929.

GEO. J. HATFIELD,
Attorney for Respondent.

Filed Jul. 10, 1929. [31]

[Title of Court and Cause.]

COST BOND.

KNOW ALL MEN BY THESE PRESENTS: The undersigned, American Employers' Insurance Company, of Boston, Massachusetts, a corporation, organized and existing under and by virtue of the laws of the State of Massachusetts, doing and authorized to do a general surety business, is held and firmly bound unto the United States of America in the sum of Two Hundred and Fifty Dollars ($250.00), to be paid to said United States of America; the payment of which said sum the undersigned American Employers' Insurance Company, of Boston, Massachusetts, hereby binds itself by these presents.

WHEREAS, lately, at the District Court of the United States, Southern Division, for the Northern District of California, in a proceeding for a writ of habeas corpus in said court, on behalf of Kaichiro Sugimoto, an order was made and entered dismissing the petition for said writ and denying said writ, and the said Kaichiro Sugimoto has obtained an order allowing an appeal and fixing cost bond, and a citation directed to the United States of America, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,—[32]

Now, the condition of the above obligation is such, that if the said appellant shall prosecute his appeal to effect, and answer all costs if he fails to make his appeal good, then the above obligation to be void.

This recognizance shall be deemed and construed to contain the express agreement for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

IN WITNESS WHEREOF, said American Employers' Insurance Company, of Boston, Massachusetts, has caused these presents to be executed by its officer, thereunder duly authorized this 9th day of July, 1929.

AMERICAN EMPLOYERS' INSURANCE COMPANY.

[Seal] By JOHN STONE PERRY,
Attorney-in-fact.

The foregoing bond is hereby approved.

FRANK H. KERRIGAN,
Judge. [33]

State of California,
City and County of San Francisco,—ss.

On this 9th day of July, in the year of our Lord one thousand nine hundred and twenty-nine, before me, John McCallan, a notary public in and for said City and County and State, residing therein, duly commissioned and sworn, personally appeared John Stone Perry, known to me to be the person whose name is subscribed to the within instrument, as the attorney-in-fact of American Employers' Insurance Co., and acknowledged to me that he subscribed the name of American Employers' Insurance Co. thereto as surety, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County and State aforesaid, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for said City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 10, 1929. [34]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States

District Court for the Northern District of California, do hereby certify that the foregoing 34 pages, numbered from 1 to 34, inclusive, contain a full, true and correct transcript of the records and proceedings, in the matter of Kaichiro Sugimoto, on Habeas Corpus, No. 20,006–K, as the same now remain on file of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of twelve dollars and fifty cents ($12.50), and that the same has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of August, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [35]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to JOHN D. NAGLE, Commissioner of Immigration, San Francisco, and GEORGE J. HATFIELD, His Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within

thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Kaichiro Sugimoto is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 10th day of July, A. D. 1929.

FRANK H. KERRIGAN,
United States District Judge.

Service and receipt of a copy of the within citation on appeal is hereby admitted this 10th day of July, 1929.

GEO. J. HATFIELD,
Attorney for Respondent.

[Endorsed]: Filed Jul. 10, 1929. [36]

[Endorsed]: No. 5921. United States Circuit Court of Appeals for the Ninth Circuit. Kaichiro Sugimoto, Appellant, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon

Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 19, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5921

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KAICHIRO SUGIMOTO,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

APPELLANT'S POINTS AND AUTHORITIES.

BIANCHI & HYMAN,
Kohl Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 5921

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KAICHIRO SUGIMOTO,

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Appellee.

APPELLANT'S POINTS AND AUTHORITIES.

STATEMENT OF FACTS.

The facts are not disputed. Appellant, now approximately forty years of age and a male native and subject of Japan, was *lawfully admitted to the Territory of Hawaii on July 29, 1907,* when almost immediately thereafter he came to the Mainland of the United States at San Francisco, where he resided ever since, for approximately twenty-one years and until July 18, 1928; "when he departed for Japan for a visit from which he is now returning," in March, 1929.

Prior to his departure he had, for many many years comprising nearly the whole of the twenty-one years, been in various lines of business, and he was,

at the time of the departure, and is now in a restaurant business of substantial proportions employing considerable help. He had married and has a wife and two minor American-born children as well as minor stepchildren, all residing at his home in the City and County of San Francisco. While he may have been a laborer at the time of his original entry to the Mainland, he was not, for the purpose of this record, a laborer skilled or unskilled during, say, any of the period of ten years last past.

FINDINGS OF THE BOARD.

The Board of Special Inquiry found: (a) "This applicant is returning from a temporary visit abroad after having lived in the United States continuously for approximately twenty-one years" (R. p. 5); (b) "This applicant is applying for admission as a returning restaurant keeper under Section 4 (b) of the Act of 1924, and presented a non-quota visa No. 365 dated at Yokohama, Japan, March 12, 1929, and a Japanese passport showing him to be returning to the United States from a temporary visit abroad" (R. p. 4); (c) That he was lawfully admitted to Hawaii July 29, 1907, ex "S/S Nippon Maru;" (d) It was also found that he was literate and in sound physical condition. (R. p. 5.)

Certain other matters in connection herewith are not subject to dispute: (1) Appellant, prior to the initiation of his visit in July, 1928, was immune from deportation; (2) Appellant could, at any time *prior to the enactment of the 1924 Act,* have returned to

Japan for a visit and re-entered the United States on a passport of the Japanese Government.

REASON ASSIGNED FOR EXCLUSION.

It is admitted that appellant's papers are in order and that he is now seeking admission under Section 4(b) of the Immigration Act of 1924 as "an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad." And it is likewise admitted, and the Department has ruled, that he is entitled to, and may, re-enter or return to Hawaii. (R. pp. 7, 15.) It is admitted that he is "an immigrant * * * who is returning from a temporary visit abroad"; and it is admitted that he was *previously lawfully admitted to the Territory of Hawaii.*

But he is excluded *solely* upon the ground that he is not "an immigrant *previously lawfully admitted to the United States.*" (R. p. 14.) This position is maintained by the Immigration Service and by the opinion of the lower court in the face of the admission that he was previously lawfully admitted to Hawaii which, under the 1924 Act, is *expressly made a part of the United States.* We believe this position to be untenable and in direct conflict with the unequivocal language of the 1924 Act.

I.

PETITIONER WAS PREVIOUSLY LAWFULLY ADMITTED TO THE UNITED STATES.

We emphatically urge that for the purposes of the 1924 Act, and admittedly we are concerned with no other Act, the appellant is an immigrant previously lawfully admitted *to the United States.* For the first time in the history of United States immigration, there was created, by the Act of 1924, a new class or designation; and that class or designation is "aliens ineligible to citizenship." The 1924 Act, for the first time, stated that aliens ineligible to citizenship might only be admitted to the United States when they fell within certain exceptions. (See Section 13 of the Immigration Act of 1924, (8 U. S. C. A. Sec. 213).) The only exception referred to in subdivision (c) of Section 13 with which we are concerned is subdivision (b) of Section 4 of said Immigration Act, (8 U. S. C. A. Sec. 204, hereinbefore quoted) which provides for and defines non-quota immigrants. In other words, combining the two sections and quoting therefrom, it would appear "no alien ineligible to citizenship shall be admitted to the United States unless such alien is admissible as a non-quota immigrant under the provisions of subdivision (b) * * *"— namely *"an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad."*

That he is "an immigrant" is apparent from the definition contained in Section 3 of the 1924 Immigration Act (8 U. S. C. A. Sec. 203); *that he is returning from a temporary visit abroad is admitted.* Now

Section 28 of the Act, subdivision (a) thereof (8 U. S. C. A. Sec. 224), containing various definitions for the purposes of the 1924 Act, defines

> "The term 'United States,' when used in a geographical sense, means the states, the territories of Alaska and Hawaii, the District of Columbia, Porto Rico and the Virgin Islands; and the term 'continental United States' means the states and the District of Columbia."

For geographical purposes, then, and that is the only purpose we are concerned with, *your appellant, having been previously lawfully admitted to the Territory of Hawaii, a part of the United States, was previously lawfully admitted to the United States.* That is the plain intendment of the 1924 Act. To say that there was intended a previous lawful admission into the "Continental United States" is to do violence to the language of Section 28 of the 1924 Act just hereinabove referred to; particularly in view of the fact that that very section draws a distinction between *"United States"* on the one hand and *"Continental United States"* on the other hand. It can hardly be contended that Congress intended any such construction of subdivision (b) of Section 4 when it, in the very same act, drew a distinction between the term "United States" and the term "Continental United States." If it intended that it should be necessary to show previous lawful entry into the "Continental United States" it must be assumed that Congress would have employed that term since it had before it and was using in the one act both terms.

It is very apparent that the Department of Labor is reaching out for a construction and searching for

a meaning beyond the statute itself, and this in a case where the language of the statute is plain and unambiguous and the meaning clear and unmistakable. The Board of Special Inquiry excluded the appellant because there was no proof of his having *"been legally admitted to the U. S."* The Board of Review fell into the same error, saying that it appeared that he was not *"regularly admitted to the Mainland,"* and that he *"entered the Mainland illegally;"* and further, that *"he is an alien who was not previously admitted to Continental U. S."* And in their second order, the Board of Review stresses the point that petitioner was *"not lawfully admitted to the Mainland,"* and that *"he was never previously lawfully admitted to the Mainland."* (R. pp. 13, 14, 15.) The points and authorities of the Government fall into the same error.

In short, all of them, in order to argue the exclusion or deportation of the appellant, are forced into the use of language not found in the 1924 Act. Subdivision (b) does not speak of previous lawful entry into the "Continental United States" or admission "to the Mainland." *These terms are all supplied by the Department and clearly involves legislation on their part rather than administration.*

It is said, on the subject of statutory construction (25 *R. C. L.* 962):

> "* * * When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. This principle is to be

adhered to notwithstanding the fact that the court may be convinced by extraneous circumstances that the legislature intended to enact something very different from that which it did enact. * * * No motive, purpose, or intent can be imputed to the legislature in the enactment of a law other than such as are apparent upon the fact and to be gathered from the terms of the law itself. A secret intention of the law making body cannot be legally interpreted into a statute which is plain and unambiguous, and which does not express or imply it. Seeking hidden meanings at variance with the language used is a perilous undertaking which is quite as apt to lead to an amendment of a law by judicial construction as it is to arrive at the actual thought in the legislative mind. * * * They (courts) cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret."

And again on page 957:

"* * * Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

And further on page 964:

"* * * There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of gov-

> ernment among three departments, the legislative, the executive and the judicial."

In the teeth of these universally applicable principles, there is no warrant in law for a departmental construction reading into the act the language *"previously lawfully admitted to the Continental United States or to the Mainland."* Even with the realization in mind that in immigration matters and regulations the department and the decisions concerning the same not infrequently strain the English language, yet there is no authority in the department to make regulations in conflict with the congressional acts. As stated in *U. S. ex rel. Pantoja,* 29 Fed. (2nd) 586,— the regulations might lawfully provide for certain matters but "they could not further curtail human liberty than as authorized by act of Congress."

Note that the Department, after great labor, finds itself using in its decisions and findings the language *not of the 1924 Act,* but language to the effect that appellant was not previously lawfully admitted to the "Continental United States" or to the "Mainland." They could not fit the existing statute to their findings or their findings to the existing statute. In short, they could not find or decide in the language of the statute and exclude the appellant. That certainly is a confession not only that the statute does not fit the case but moreover that they are doing a bit of legislating on their own.

The act in question was enacted by Congress in 1924. In 1924, the appellant was both here "in the United States" and here in the "Continental United States" as defined by that Act. He was here immune

from any deportation. When Congress enacted the 1924 law, it gave the appellant the *right to go and come non-quota* for it did not restrict or limit such right to those legally admitted in the "Continental United States" or "Mainland" but to those legally admitted *in the United States.* The Congress will be presumed to have had before it all the facts and to have intended just what it enacted.

ONLY ONE ENTRY INTO UNITED STATES.

In the case last cited, the phrase "in the United States" was the subject of the decision. There the alien, after entry and unlawfully overstaying his sixty day limit, shipped on an American vessel which, by a fiction, was American territory and touched at Japanese, Chinese and Mexican ports. The court said (italics ours):

> "The concept that he has not been out of the country is clear enough on the fiction of which we have spoken. If his second voyage is a second entry into this country, *from what country does he come;* and, if he is to be deported, what is the country 'whence he came.'
>
> "* * * 'In the United States' means remaining within its territorial limits. For many purposes, however, including an interpretation of the immigration law, an American vessel is American soil. When, therefore, one who is in the United States boards the American vessel, and remains on board of her until her return to her home port, he cannot be classed *as an alien immigrant 'coming from' any other country,* no matter at how many foreign ports the vessel may have touched, *for he has never, for immigration nor for many other purposes, been out of the United States.*"

For the purpose of the instant case, it is necessary to consider but one qualifying element, and that is a previous lawful admission "*in the United States.*" That element is present. There is nothing in the act requiring that this shall have reference only to the last entry, *but be that as it may there is only one entry into the United States.* The 1924 Act deals entirely and exclusively with immigrants. As an immigrant, the appellant *entered but once.* He was not thereafter out of the United States. Not only was he continuously thereafter in the United States, as clearly defined by the 1924 Act, but further his coming from Hawaii to the Mainland was not an immigration; for immigration, as defined by the 1924 Act, Section 3 thereof, is the coming of an alien from a country outside the United States. The clear import of the case last cited is that the appellant was never, after his entry at Hawaii, outside of the United States. If he was, whence did he come from and what country is he to be deported to? (See *U. S. ex rel. Pantoja,* 29 Fed. (2nd) 586.)

We believe the conclusion irresistible that the appellant is entitled to his liberty and admission as an alien non-quota immigrant returning from a temporary visit abroad and previously lawfully admitted "to the United States" as defined by the 1924 Act. Any other construction of that act would be taking great liberty with the solemn pronouncement of Congress.

II.

USELESS ACT TO REQUIRE RETURN TO HAWAII.

The Department of Labor has ruled in the instant case that appellant was legally admitted to Hawaii and that he is now entitled to return to Hawaii. (R. p. 15.) That the appellant is not now, and has not for years been, a laborer is alleged in the petition for the writ herein and is apparently admitted by the decision of the court below as well as the Department of Labor. If, therefore, appellant were now in Hawaii or should later return to Hawaii, he, not now being a laborer, could immediately obtain form 546 granting him permission to board a steamer for the Mainland of the United States. We seriously urge that there is no law now in force, nor has there ever been any law, or perhaps, as we will later show, can there ever be any law to stop a Japanese lawfully admitted to Hawaii from coming to the United States Mainland except perhaps in the single instance where he is a laborer.

We, therefore, in this connection now make, as we did in the court below, the further point that it is useless and futile to require appellant to return to Hawaii. Sending him back merely means that he can immediately return on different papers. Therefore, if he voluntarily goes back to Hawaii it involves nothing more than the useless act and expense of returning to the United States.

In re Spinnella, 3 Fed. (2nd) 196, a relator presented himself for admission with a quota visa. The Board excluded him because they found that he was in the non-quota class and not in possession of a

non-quota visa. The Federal court ordered his discharge, however, upon the ground that it would be a useless act to send him back because "there is a favored maxim in equity that equity regards as done that which ought to be done. We speak of the view which equity would take of the matter because it is manifest that the Act of May 26, 1924, proceeds upon equitable principles and is intended to be administered accordingly; and this should be interpreted with proper regard of the spirit which prompted it." Appellant has expressed his desire and intention of immediately returning to the City and County of San Francisco, to his home, his wife, his children and his business; and in view of the authority last cited and the rule generally that useless acts will not be required of anyone, we believe it should weigh with the court in considering the discharge of appellant.

III.

NO LEGAL AUTHORITY FOR PRESIDENTIAL PROCLAMATION TO EXCLUDE TRAVEL FROM HAWAII.

We have advanced the point, in connection with the first phase of our argument, that as an immigrant appellant had entered the United States as defined by the 1924 Act but once previous to his detention at Angel Island. And this upon the theory that one coming from Hawaii to the Mainland is not, strictly speaking, or in legal parlance, an immigrant. We urge the further point, in connection with the Presidential Proclamation relied upon by the Government and by the opinion of the court below, that there has never

been, nor perhaps could there constitutionally be, any rule which would restrict the coming of anyone legally residing in Hawaii to the Mainland. The statutory provision which first appeared in the 1907 Immigration Act and later in the 1917 Immigration Act (8 U. S. C. A. Sec. 136 (h)) refers only to foreign countries "or to any insular possession of the United States or to the Canal Zone." It *does not refer to American territory proper.*

The Territory of Hawaii became an incorporated territory by act of Congress in 1900. It then acquired the same status as Alaska now has or as New Mexico once had—an incorporated territory of the United States entitled to the full and uniform protection that the Constitution of the United States affords to its states and to other incorporated territories. (*Hawaii v. Mankichi,* 190 U. S. 197, 211; 47 L. Ed. 1016, 1020; *Downes v. Bidwell,* 182 U. S. 244; 45 L. Ed. 1088; 21 Sup. Ct. Rep. 770; 38 *Cyc.* 195, 196.)

It is more than doubtful as to whether Congress could constitutionally have included the Territory of Hawaii in the statutory provision just referred to as enacted in 1907 and later in 1917. But suffice it to say that Congress did not so include the Territory of Hawaii but merely insular possessions and the Canal Zone. And in this connection we urge that the Presidential Proclamation enacted in 1907 as including the Territory of Hawaii along with insular possessions and the Canal Zone was done without the authority of Congress. And, *a fortiori,* the entry of appellant in 1907 from Hawaii to the Mainland was

not unlawful *even at that time* as urged by the Government and by the decision of the lower court.

IV.

POSITION TAKEN BY OPINION OF COURT BELOW SUSTAINING GOVERNMENT POSITION.

The opinion of the court below sustaining the Government falls into three parts—the *first part* ending at the beginning of the last paragraph on page 22 of the record, the *second part* ending at the top of page 24 of the record and the balance of the decision comprising the *third part.*

Now under the 1924 Act, the presence of two elements are necessary to insure the entry of the immigrant—*first,* he must be one "who is returning from a temporary visit abroad," *and second,* he must be "an immigrant previously lawfully admitted to the United States."

The first part of the opinion is not quite clear to us, but seems to be directed at the first element above set forth. Why it should go into that we are not clear because it seems to be admitted all the way through that appellant is one "who is returning from a temporary visit abroad." The fallacies of that portion of the opinion seem to lie in the unwarranted assumptions first, that appellant is seeking entry under some law *other than* the 1924 Act; and second, that the domicile to which he is returning is non-existent. But this is not true. Bearing in mind the 1924 Act, the fact would seem to be that the alien appellant is returning from a temporary visit abroad, to his home,

to his wife and children, to his business and to the place where for twenty years he has continuously resided. He is returning to a domicile in fact.

It does make a difference that appellant was, at the time of the enactment of the 1924 Act and for a long time prior thereto and continuously thereafter, making his home in the City and County of San Francisco because that is the very circumstance that enables him to come within the classification of *one who is returning from a temporary visit abroad.* Else he would have no place to "return from or to" and could not possibly come within the classification. And there is no Congressional act, past or present, which stops him from being within the express designation of one "who is returning from a temporary visit abroad." And, in fact, the Department of Labor actually found that he was one who was returning from a temporary visit abroad.

The second part of the opinion states (Rec. p. 22):

> "But it is urged on behalf of the alien that the illegality of his entry to the mainland in 1907 is immaterial in view of his lawful entry and admission to Hawaii. This contention is based upon the definition of 'United States' in sec. 28 (a), Immigration Act of 1924 (8 U. S. C. A., sec. 224a) * * *"

This is directed to a real issue of law in the case—that is, as to whether appellant was one who had been previously lawfully admitted to the United States as defined by the 1924 Act. The Government argues, in connection herewith, that appellant was not previously lawfully admitted to the United States *but only admitted to a part of the United States,* and the court

below, following that position, states that "the lawful admission to Hawaii is a restricted admission," which amounts to nothing more or less than the Government's statement that it was a lawful admission to only a part of the United States. This position leads the opinion into the further error of reading into subdivision (a) of Section 28 of the 1924 Act all of the previous immigration laws, and particularly the Immigration Act of 1907, in such a manner as to do violence to the very express terms of the 1924 Act.

Of course, the 1924 Act is "in addition to and not in substitution" of all of the previous immigration laws or acts. And were the 1924 Act silent on the subject, it might perhaps be argued that the 1907 Act would obtain.

But the 1924 Act is not silent. It does state that an immigrant may return from a temporary visit abroad *if he had been previously lawfully admitted to the United States* and defines the term *"United States,"* in that connection as *"the states, the territory of Alaska and Hawaii * * *."* No exception is made as to "restricted admissions or "admissions to part of that United States." Suppose the 1924 Act had provided expressly that certain aliens could enter. Could it be said that by virtue of this particular section (Sec. 25 of the 1924 Act) there would be any warrant in law for excluding them upon the ground that they were excludable by virtue of some other and former act or acts? In other words, all that is intended by Section 25 is that an alien may be excluded under previous acts notwithstanding there is no provision for his exclusion in the 1924 Act. But it is not intended that the provisions of preceding acts

should affect the express provisions of the 1924 Act. The 1924 Act is not "self repealing." The opinion violates all the known rules of statutory construction when it reads into Section 4 (b) of the Immigration Act of 1924 and Section 28 (a) of that Act an exception or restriction to the effect that it applies only to previous lawful entries to the "Continental United States."

How particularly absurd that is when you consider that both of the sections last referred to refer to "United States" and to "Continental United States" with a fine discrimination. Throughout the Act the terms "United States" and "Continental United States" are used as distinguished from each other. And the opinion certainly does violence to the terms of the two sections quoted when it puts into the mouth of Congress the exception referred to.

The third part of the opinion, while apparently admitting the soundness of the rule announced *in re Spinnella,* 3 Fed. (2nd) 196, and *ex parte Seid Soo Hong,* 23 Fed. (2nd) 847, to the effect that courts will not exclude aliens merely because they present the wrong papers when on the record they obviously are otherwise admissible, nevertheless erroneously holds that appellant is not entitled to the benefit of the legal principles therein announced.

The court, in that respect, did not meet our position. It is our claim, as made in the second subdivision herein, that it would be a useless act to require appellant to return to Hawaii only to then immediately go to the expense of returning to the Continental United States with Form 546 granting him permission to board a steamer for the Mainland

from Hawaii—and this upon the theory that there is no law preventing appellant, since he is no longer, and has not for some time been, a laborer, from coming to the Mainland from Hawaii at this time.

The opinion raises the point that he is not (Rec. p. 24) "an alien entitled to enter the United States solely to carry on trade under and in pursuance of a present existing trade of commerce and navigation." But we are not concerned with that. Appellant is conceded the right to be and reside in Hawaii; and the only possible obstruction in the way of his coming to the Mainland from Hawaii is the Presidential Proclamation which is *inapplicable to one who is not at the time a laborer.*

Therefore, irrespective of what his vocation may be, as long as he is not a laborer he would be entitled to enter with the proper papers from Hawaii to the Continental United States, and it is a vain and useless act, necessitating unnecessary expenditures to and from this territory, to demand that your appellant go back to Hawaii and re-enter with papers to which on the record before this court he is admittedly entitled to.

It is respectfully submitted that the order of the court below should be reversed and appellant discharged and allowed to enter.

Dated, San Francisco,
October 26, 1929.

BIANCHI & HYMAN,
Attorneys for Appellant.

No. 5921

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

KAICHIRO SUGIMOTO,
Appellant,

vs.

JOHN D. NAGLE, as Commisisoner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE

GEORGE J. HATFIELD,
United States Attorney,

HERMAN A. VAN DER ZEE,
Asst. United States Attorney,
Attorneys for Appellee.

Neal, Stratford & Kerr, S. F.

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No. 5921

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STATEMENT OF FACTS

This is an appeal from a judgment of the District Court for the Southern Division of the Northern District of California, denying a petition for writ of habeas corpus filed on behalf of appellant, who stands excluded from the United States by the decision of a Board of Special Inquiry at San Francisco, affirmed on appeal by the Secretary of Labor.

The petition and amended petition set up the findings of the Board of Special Inquiry at the Port and the findings of the Board of Review at Washington on appeal (Tr. 4, 5 and 13-17 inclusive). The facts found by

the executive board are not disputed. Appellant was admitted into Hawaii on July 29, 1907. During August, 1907, he came to San Francisco, paying $60 to be smuggled in aboard a freighter. At that time he was a laborer and did not have a passport entitling him to come to the continental United States. He remained here until July 18, 1928, when he departed for Japan (Tr. 4 and 5).

Appellant seeks admission under § 4-B of the Immigration Act of 1924 (8 USCA § 204) as:

> "An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad."

The Department has ruled that detained may reenter Hawaii if he so desires, as he was previously admitted to that territory, but that since his previous admission was a limited one, merely for residence in Hawaii and since such previous residence as he has had in the continental United States was unlawful, he has no right of entry to the continental United States (Tr. 13 to 17 incl.).

ISSUE OF THE CASE

The issue before this Court is whether, upon the facts found by the executive, appellant is embraced within § 4-B of the Immigration Act of 1924, quoted above; more narrowly: Is appellant one "previously lawfully admitted to the United States" for the purposes of that section?

Appellant's argument has three phases:

(a) That having been admitted to Hawaii in 1907 he

is now an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad within the meaning of § 4-B of the Immigration Act of 1924, supra, the term "United States" being defined in § 28 of the same Act (8 USCA § 224) as meaning "the states, the territories of Alaska and Hawaii, the District of Columbia, Porto Rico, and the Virgin Islands."

(b) That if appellant avails himself of the privilege extended to him by the Secretary of Labor of proceeding to and entering Hawaii, he can immediately return to and enter the mainland since he is not now a laborer;

(c) That the entry of appellant from Hawaii to the mainland in 1907 was not unlawful because there is no legal authority for the President's proclamation promulgated on March 14, 1907, which prohibits the coming from Hawaii to the continental United States of Japanese laborers.

ARGUMENT

A. APPELLANT IS NOT ONE "PREVIOUSLY LAWFULLY ADMITTED TO THE UNITED STATES" WITHIN THE MEANING OF § 4-B OF THE IMMIGRATION ACT OF 1924.

To determine whether appellant is an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad, it is necessary to look to the circumstances of his original entry and to the laws applicable thereto.

When detained originally entered the continental United States from Hawaii, the Immigration Act of February 20, 1907, (34 Stats. 898, C. 1134) was in force.

Section 1 of that Act contained the following provision:

> "Provided further, that whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone."

This provision is similar to that now contained in § 3 of the Immigration Act of February 5, 1917, (8 USCA § 136).

In pursuance of the Immigration Act of 1907, the President on March 14, 1907, issued the following proclamation:

> "Whereas, by the act entitled 'An Act to regulate the immigration of aliens into the United States,' approved February 20, 1907, whenever the President is satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holders to come to the Continental territory of the United States to the detriment of labor conditions therein, it is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such country or such insular possession or from the Canal Zone;
>
> "And whereas, upon sufficient evidence produced before me by the Department of Commerce and Labor, *I am satisfied that passports issued by*

the government of Japan to citizens of that country or Korea and who are laborers, skilled or unskilled, to go to Mexico, to Canada, *and to Hawaii,* are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;

"*I hereby order that such citizens of Japan or Korea,* to-wit, Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada, *or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States.*

"It is further ordered that the Secretary of Commerce and Labor be, and he hereby is, directed to take, through the Bureau of Immigration and Naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect."

The history of this legislation is reviewed by this Court in the case of Akira Ono v. United States, 267 Fed. 359. The proclamation above cited continued in effect until February 24, 1913, when President Taft issued a similar proclamation under the so-called "gentlemen's agreement" between the United States and Japan. The provision cited from the Act of February 20, 1907, was re-enacted in §3 of the Act of February 5, 1917 (8 USCA § 136), now in force.

It is clear from the foregoing that appellant's admission into Hawaii in 1907 was a restricted admission and carried simply the privilege to reside in that territory. It is equally clear that when he thereafter smuggled himself into the continental United States, being then a laborer, his entry into the continental United States and subsequent residence therein was in violation of law.

Appellant contends, however, that under § 28 of the Immigration Act of 1924 (8 USCA §224) the territory of Hawaii is embraced within the meaning of the term "United States" and that having been admitted into Hawaii appellant is now entitled to enter any portion of the United States by virtue of such admission.

It does not seem to be seriously contended by appellant that he has derived any rights from the fact that he has resided in the continental United States for a number of years, his sole claim resting upon his admission to Hawaii in 1907. The authorities are unanimous that an alien can gain no rights by a residence in the United States which has been unlawfully acquired.

Hurst v. Nagle (C. C. A.-9), 30 F. (2d) 346;
U. S. ex rel Fanutti v. Flynn, 17 F. (2d) 432;
Ex parte Chun Wing, 18 Fed. (2d) 119;
Ex parte Mac Fook, 207 Fed. 696;
Ex parte Di Stephano, 25 F. (2d) 902;
Dominici v. Johnson, 10 F. (2d) 433.

In Hurst v. Nagle, *supra,* this Court said, "No domicile in the United States can be established by an alien whose original entry was unlawful."

In the case of Ex parte Chun Wing, 18 F. (2d) 119, District Judge Neterer said:

> "Residence in the United States fraudulently obtained, creates no right. This court in Ex parte *Mac Fook,* 207 Fed. 696, at page 698 said: 'No lapse of time would ripen such a wrong into a right nor afford a basis upon which to predicate abuse of discretion.' "

And the Court said further:

> "Clearly residence must be legal residence. Fraud vitiates everything."

In U. S. ex rel Fanutti v. Flynn, 17 F. (2d) 432, the Court said:

> "Having resided unlawfully in this country for a period of five years and continuing an alien, his status was not changed. He did not thereby become exempt from the operation of the Immigration Act. His departure and absence subjected him to the Act relating to the exclusion and deportation of aliens *in the same manner as though he had no previous domicile in this country.*"

The Court further said:

> "It makes no difference that he could have remained here, assuming such to be the fact, had he not departed and sought to return."

Appellant contends that having been admitted to Hawaii he has been lawfully admited to the United States, Hawaii being a part of the United States, and hence that he has a right now to re-enter the continental United States.

The original entry of appellant to the continental United States was clearly unlawful. Under the authorities cited above, he could gain no rights by his surreptitious entry to the mainland greater than were impiled in his admission to Hawaii. The right given him by his admission to Hawaii was the right to reside in that territory and the law specifically prohibited his coming to the mainland. His surreptitious entry to and subsequent residence in the continental United States was therefore unlawful and a fraud upon the government, and hence, under the authorities, left him in the same position as if he had never come to the mainland.

The various immigration acts are in *pari materia* and must be read together as one act.

> *Commisisoner of Immigration v. Gottlieb,* 265 U. S. 310;
> *Hurst v. Nagle* (C. C. A-9), supra, 30 F. (2d) 346;
> *U. S. ex rel Barone v. Curran,* 7 F. (2d) 302;
> *U. S. v. Tod,* 297 Fed. 214.

Section 25 of the Immigration Act of 1924 (8 USCA § 223) provides:

> "The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, *and shall be enforced as a part of such laws,* and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this act."

The facts show that appellant has not been previously lawfully admitted to the "United States." He has been previously granted an admission specifically restricted to a part of such United States, his migration to other territories embraced within the United States having been expressly prohibited by law.

Petitioner is attempting to isolate certain portions of the Act of 1924 and argue therefrom that there is a *casus omissus* in that statute. But § 25 of that Act (8 USCA § 223) expressly provides that said Act shall be enforced as a part of the immigration laws, and § 28 of the same Act (8 USCA § 224) defines the term "immiragtion laws" as including all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens. The language of

the Act clearly shows that the suggested loophole by which an alien might gain a preferred status by his earlier evasion of the immigration statutes is in fact non-existent.

As to the history and purpose of the restrictions upon Japanese domiciled in the Territory of Hawaii, we quote briefly from a pamphlet issued by the Department of Labor in January, 1929, entitled "Problems of the Immigration Service:"

> "The estimated population of Hawaii on June 30, 1928, was 348,767, exclusive of the military and naval establishments. Of this population, in round numbers, 37,000 are American, English, German or Russian in race; *135,000 Japanese, 6,000 Koreans;* 60,000 Filipinos; 25,000 Chinese; 21,000 Hawaiians; 29,000 Portuguese; 2,000 Spaniards; 7,000 Porto Ricans; 10,000 mixed Hawaiian-Oriental; 16,000 mixed Hawaiian-white."
>
> "Congress in enacting immigration and naturalization legislation has differentiated between persons of the white and of brown and yellow races. In naturalization matters this has been true for over a hundred years; in immigration matters since 1882, so far as Chinese are concerned, and since 1907 so far as Japanese and Koreans are concerned, and most emphatically to the same effect is section 13 of the immigration act of 1924."
>
> "The restrictions upon Chinese aliens domiciled in Hawaii are a part of the contract under which Hawaii was annexed to the United States some 30 years ago. The restrictions as to alien Japanese and Korean laborers domiciled in Hawaii is the natural and reasonable outgrowth of certain exceptional concessions made by the Federal Government to the Territory of Hawaii in the importation of contract laborers, * * * "

The position contended for by appellant would involve a holding that the largest racial group in the Territory of Hawaii, which racial group Congress has seen fit to prohibit from coming to the continental United States for the reasons set forth above, might all evade this prohibition by going abroad and coming thence to the continental United States and demanding admission thereto on the ground that they had been previously admitted to Hawaii and hence that they were aliens "previously lawfully admitted to the United States" and "returning from a temporary visit abroad." To state the proposition is to show its absurdity.

To attribute such an intention to Congress in enacting § 4(b) of the Immigration Act of 1924, would be preposterous. It is true that Congress in that Act uses the expression "continental United States," and uses it solely in regard to the national origins plan of computing annual quotas on the basis of the number of inhabitants of each nationality who were domiciled in the "continental United States" in 1920 (8 USCA § 212). But nowhere in the Act does there appear any intention to enlarge the privileges of aliens who at the time of its enactment had only a restricted right of residence in the country. As appellant states, for the first time in history Congress by the Act of 1924, created for immigration purposes a class designated as "aliens ineligible to citizenship," and provided for their absolute exclusion with certain narrow exceptions. In view of this fact and the explicit language of § 25 of the Act, *supra,* it is obvious that the Act does

not contemplate a removal of the bars upon Japanese and Chinese immigration from Hawaii to the continental United States.

Appellant's argument amounts to this: That if an alien has been admitted to the United States under any circumstances, conditions or restrictions whatsoever, he would be entitled to re-enter the United States without restriction by reason of the fact that immigrants previously lawfully admitted to the United States and returning after a temporary visit abroad are made non-quota immigrants by § 4-B of the Immigration Act of 1924. It would hardly be contended, for instance, that an alien who had been previously admitted for a period of 60 days as a seaman or for a temporary period as a visitor could leave the United states temporarily and on the basis of his previous conditional admission demand an unconditional admission on his return. Yet the previous admission of appellant to Hawaii is just as much a restricted and conditional admission as would be a previous admission as a temporary visitor or as a seaman in pursuit of his calling as such.

The applicable principle of law in this case is very clear from this Court's recent decision in the case of Hurst v. Nagle, 30 F. (2d) 346, *supra*. There the appellant had originally entered the United States unlawfully. After residing here for some time he crossed the border to Mexico and re-entered the United States the same day. He was ordered deported on the ground that his entry from Mexico was in violation of the first Quota Act of May 19, 1921, as amended (which act has now been superseded by the Act of 1924, involved

here). Appellant made the same contention as is raised by petitioner here. He contended that since the Act of 1921, exempted "aliens returning from a temporary visit abroad," he was not within the excluded class at the time of his re-entry as that Act did not require him to show a prior lawful admission in order to bring himself within that exemption, and that the Department was attempting to read into the statute language not contained therein. In affirming the judgment of the District Court denying the writ, this Court said:

> "We think the returning aliens there referred to are aliens who had been lawfully domiciled in the United States. Such is the construction placed upon the act by the Secretary of Labor, in providing by rule 2a that temporary absence shall be construed to mean 'an absence in any foreign country without relinquishment of domicile,' thus clearly importing that the domicile in the United States must have been lawful. No domicile in the United States can be established by an alien whose original entry was unlawful. U. S. v. Flynn (D. C.) 17 F. (2d) 432; Domenici v. Johnson (C. C. A.) 10 F. (2d) 433; Ex parte Di Stephano (D. C.) 25 F. (2d) 902."

The Court went on to refer to the well-settled rule that the immigration statutes are in *pari materia.*

The petition of Hurst to the United States Supreme Court for *certiorari* was denied. (279 U. S. 861).

The doctrine in that case is plainly applicable to the situation here and is ample authority for the proposition than an alien having been granted the privilege of residence in a certain portion of the United States can not by evading a statute prohibiting his entry to

other portions thereof, acquire any right based upon his evasion.

Appellant's argument as to the principles of statutory construction loses its force when applied to the circumstances of this case and of the case of Hurst v. Nagle, *supra,* the decision in which clearly shows that an alien's right of re-entry as a returning resident can only grow out of previous lawful domicile.

As to the case of U. S. *ex rel* Pantoja, 29 F.(2d) 586, cited and discussed in petitioner's points and authorities, which case was decided on the theory that an alien making a round trip foreign from the United States on an American vessel was not out of the United States on the voyage, it is sufficient to invite attention to the fact that this doctrine was overruled by the Supreme Court in an opinion rendered on May 13, 1929, in the case of U. S. *ex rel* Claussen v. Day, 279 U. S. 399, wherein the Supreme Court held that such an alien was "coming from a foreign port or place."

B. APPELLANT COULD NOT IMMEDIATELY ENTER THE CONTINENTAL UNITED STATES FROM HAWAII AT THIS TIME.

The second contention of appellant is: That if he should avail himself of the privilege extended by the Secretary of Labor of proceeding to and entering the territory of Hawaii at this time, he could immediately return to and enter the continental United States because he is not now a laborer.

Appellant's contention in this regard meets with the same difficulty as his first contention. His claim here is based upon the fact that after smuggling into the con-

tinental United States he engaged in the occupation of restaurant keeper and hence acquired a status which removes him from the class of laborers.

It is settled that under the immigration laws the exempt status or occupation is a status existing at the time of application for entry and not a status to be thereafter acquired.

> *Tulsidas v. Insular Collector of Customs,* 262 U. S. 258.

In Wong Fat Shun v. Nagle, 7 F.(2d) 611, this Court said:

> "And the entry having been unlawful, he could not thereafter acquire an exempt status by engaging in the business of a merchant in San Francisco. (Citing U. S. v. Chu Chee, 93 Fed. 797, 35 C. C. A. 613; Ex parte Wu Kao (D. C.), 270 Fed. 351."

Accord:

> *In re Low Yin,* 13 F. (2d) 265;
> *Ewing Yuen v. Johnson,* 299 Fed. 604.

In the case of Tulsidas v. Insular Collector of Customs, *supra,* the applicants involved were of that racial group of Asiatics who are, with certain exceptions, excluded from the United States by § 3 of the Immigration Act of February 5, 1917 (8 USCA § 136). The claim advanced was that the applicants were merchants by reason of the fact that they had entered into a partnership agreement to conduct a business at Manila after entry. It was held that such a situation was insufficient to exempt the applicants from the classification of "laborer" as used in the Immigration Act, and that an alien must show that he possessed a mercantile status in the country from which he came

and not merely a status to come, or a status to be established in the United States.

Similarly the other authorities cited above establish the settled proposition that no rights can flow from a residence in the United States which was unlawful in its inception and that no exempt status follows from a mercantile occupation followed in the United States after an unlawful entry. Appellant's second contention is directly opposed to these settled principles inasmuch as his claim to be of an exempt status rests upon the fact of the occupation which he pursued in the continental United States after his surreptitious and unlawful entry thereto.

C. THERE WAS LEGAL AUTHORITY FOR THE PRESIDENT'S PROCLAMATION OF MARCH 14, 1907.

Appellant's third contention merits but passing mention. He suggests a doubt that Congress could constitutionally have imposed restrictions upon alien travel from Hawaii to the continental United States.

Nothing is better settled than that the power of Congress over the entire subject of immigration is plenary, and that Congress may constitutionally regulate the admission of aliens to and the residence of aliens in the United States, and may prescribe terms and conditions upon which they may enter, reside in, or pass through the United States.

Yamataya v. Fisher (the Japanese immigrant case), 189 U. S. 86;
Chuoco Tiaco v. Forbes, 228 U. S. 549;
Lapina v. Williams, 232 U. S. 78;
Wong Wing v. U. S., 163 U. S. 228;
Keller v. U. S., 213 U. S. 138;
Lem Moon Sing v. U. S., 158 U. S. 538.

Over no conceivable subject is the power of Congress more complete.

> *Oceanic Steamship Nav. Co. v. Stranahan,* 214 U. S. 320.

Appellant further suggests that under the Immigration Act of February 20, 1907 (34 Stats. 898, c. 1134), the territory of Hawaii is not included within the meaning of the language "any insular possession of the United States."

Since the power conferred by that act is to refuse to permit certain aliens to enter the *"continental territory of the United States,"* it would seem to be clear that the language "any insular possession of the United States" would necessarily include Hawaii and hence, that the President's proclamation of March 14, 1907, specifically mentioning Hawaii, was promulgated under definite authority of Congress. It is significant that in the prohibition contained in the President's proclamation, Hawaii is the only insular territory of the United States which is mentioned, and taken in connection with the history of the legislation, judicial notice of which was taken by this Court in the case of Akira Ono v. U. S., *supra,* it is difficult to say that Congress did not have the territory of Hawaii *particularly* in mind in enacting the legislation referred to.

D. APPELLANT IS ALSO PROHIBITED FROM ENTERING THE CONTINENTAL UNITED STATES UNDER THE PRESIDENT'S PROCLAMATION OF FEBRARY 24, 1913, WHICH IS NOW IN FORCE (8 USCA § 136; RULE 7 IMMIGRATION RULES OF MARCH 1, 1927).

At the time appellant left Japan and at the time he clandestinely entered the continental United States, he

was a laborer. His only claim to be other than a laborer rests upon pursuits which he followed here after his unlawful entry from Hawaii. On the authorities cited above such pursuits avail him nothing to remove him from the classification of laborer under the immigration laws. Hence, by reason of § 3 of the Immigration Act of February 5, 1917 (8 USCA § 136), and the President's proclamation of February 24, 1913, both of which are still in force, appellant is prohibited from entering the continental United States at this time for a reason additional to that heretofore discussed. In Akira Ono v. U. S., *supra,* this Court held that under the act and proclamation just referred to, a Japanese person who is a laborer is prohibited from entering the continental United States even with a passport from his government. In that case this Court said, at page 363:

> "It is obvious, therefore, that even if the appellant had arrived at Galveston with a passport from his government and had sought by reason thereof entry into this country, the immigration officials at Galveston would have, as in duty bound, denied him admission; a fortiori, his surreptitous entry into the United States was clearly unlawful."

It is true that this additional ground for exclusion was not mentioned by the Board of Special Inquiry nor by the Secretary of Labor. However, in Weedin v. Mon Him, 4 F.(2d) 533, this Court said:

> "In disposing of the question of the appellant's right to enter the United States we are not confined to a consideration of the grounds on which he was excluded by the local authorities; we may properly advert to other ground on

which as matter of law that conclusion would follow."

CONCLUSION

Concisely stated, the present case amounts to this: Appellant obtained in 1907 a restricted admission to the territory of Hawaii carrying the privilege of residing within that territory. It is undisputed that he was then a laborer and had no passport entitling him to come to the continental United States. Almost immediately after obtaining his restricted admission he proceeded to enter the continental territory of the United States in a clandestine manner. His entry to the continental United States at that time was clearly prohibited by law. He departed from the United States and now demands re-admission into the continental United States on the basis of his former unlawful and fraudulent residence therein.

All the authorities we have been able to find are uniformly to the effect that no rights whatever flow from such an unlawful entry and residence in the United States, and that the fact that such an alien may have followed an exempt pursuit during the period of his unlawful presence here, avails him nothing toward a right to re-enter or remain.

Appellant can point to no basis for his claim of right to enter at this time except his previous action in evading the laws of the United States. Under the settled principles of law which we have discussed above, appellant is in the same position as though he had never come to the mainland from Hawaii. Hence, his rights of re-entry can be no broader than those implied in his

restricted admission to that territory, which restricted admission is the limit of the only privilege which the United States has ever accorded to him.

Not only is the domicile to which appellant claims to be returning legally non-existent, but his entry is also prohibited under other portions of the immigration laws. At the time he left Japan he was a laborer. At the time he left Hawaii he was a laborer. And within the scope of the immigration laws he is still a laborer inasmuch as his only claim to be otherwise rests upon an occupation which he pursued during his unlawful residence in the United States. Having legally estabilshed no other status than that of a laborer, he is prohibited from entering at this time by the Persident's proclamation of February 24, 1913, which is still in force (8 USCA § 136; Rule 7, Immigration Rules of March 1, 1927), this wholly apart from the fact that he is also prohibited from entering the United States by the Immigration Act of 1924, since he is not within the exception contained in § 4-B of that Act (8 USCA § 204).

It is submitted that the judgment of the Court below denying the petition for writ was correct and should be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

HERMAN A. VAN DER ZEE,
Asst. United States Attorney,
Attorneys for Appellee.

5923

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

KENNETH E. BANKS,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

Transcript of Record

Names and address of Attorneys of Record:

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For Appellant.

B. A. GREEN,

Corbett Building, Portland, Oregon.

For Appellee.

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of American, Defendant.

CITATION ON APPEAL

United States of America,
District of Oregon } ss.

TO KENNETH E. BANKS and his Attorney, B. A. GREEN, GREETING:

WHEREAS the United States of America has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States for the District of Oregon in your favor and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereto to show cause, if any there be, why the judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said District this 2nd day of August in the year of our

Lord One Thousand Nine Hundred Twenty-nine.

JOHN H. McNARY,

Judge.

United States of America, }
} ss.
District of Oregon }

Due and legal service of the within CITATION ON APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof, duly certified to as a correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

In the District Court of the United States for the District of Oregon, November Term, 1928.

Be It Remembered, That on the 13th day of December, 1928, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I.

Plaintiff is now a resident and inhabitant of the State of Oregon and a citizen of the United States of America.

II.

That heretofore and during the year 1917 plaintiff served with the military forces of the United States of America and on the 16th day of November, 1917 made application for and received a policy of war risk insurance in the sum of $10,000.00, conditioned that the said defendant would pay to the plaintiff the sum of $57.50 per month should he become permanently and totally disabled, as defined by law: that thereafter the premiums were paid upon said policy to and including the month of August, 1919, and thereafter under date of February 16, 1927 said plaintiff executed an application for reinstatement of the full amount of his lapsed war risk term insurance and a conversion of the same to a five

year convertible term policy, all as made and provided by law.

III.

That at the time of his application for a reinstatement and at the time of the conversion of said policy, he was suffering from a disability resulting from service, from which he was receiving compensation; that with said application and at the time thereof, plaintiff complied with all the rules and regulations of the Veterans Bureau with respect to physical examinations and plaintiff made demand as provided by law for the conversion of said policy and was informed by said defendant, thru its physicians and surgeons, and believed, and therefore alleges that at the time of said conversion of said policy he was suffering a degree of disability less than permanent, total; and plaintiff made payment of the back premiums on his said policy with interest at five per cent. per annum, as provided by law. That thereafter upon said application for reinstatement and conversion there was issued to plaintiff a $10,000.00 Five Year Convertible Term Policy.

IV.

That after the date of reinstatement of said policy plaintiff's condition deteriorated on account of the disease from which he was then suffering, to-wit, valvular heart disease, mitral insuf-

ficiency, non-compensating, and on and during the month of July, 1927 and under orders of the defendant, plaintiff was examined and his condition was found to be one of permanent and total disability, as of July 8, 1927, and plaintiff alleges that his condition upon July 8, 1927 was that of one permanently and totally disabled, and alleges that this condition will continue thruout his life.

V.

That after the date of re-instatement and conversion of said policy, plaintiff paid the monthly premiums due on his policy, as provided by law, until and about the month of July, 1927 at which time he was advised by said defendant that he was permanently and totally disabled and that further payments on his converted policy need not be made.

VI.

That thereafter and subsequent to the allowance to said plaintiff of the award of permanent and total disability, the defendant failed and refused and now fails and refuses to pay said plaintiff under the terms and pursuant to the provisions of the said converted policy, and has disagreed with said plaintiff as to his claim and now disagrees with plaintiff.

WHEREFORE, plaintiff prays for judgment

and decree of this court that he was on the 8th day of July, 1927 permanently and totally disabled and will ever be, and that he recover from said defendant pursuant to the terms and conditions of said policy, as in this complaint described, and for plaintiff's costs and disbursements incurred herein.

B. A. GREEN,
Attorney for Plaintiff.

State of Oregon, }
County of Multnomah } ss.

I, Kenneth E. Banks, being first duly sworn, depose and say that I am plaintiff in the above entitled cause; and that the foregoing Complaint is true as I verily believe.

KENNETH E. BANKS.

Subscribed and sworn to before me this 12th day of December, 1928.

B. A. GREEN,
Notary Public for Oregon.
(SEAL) My Commission expires Nov 7, 1932.

State of Oregon, }
County of Multnomah } ss.

Due service of the within complaint is hereby accepted in Multnomah County, Oregon, this ..... day of December, 1928, by receiving a copy

thereof, duly certified to as such by B. A. Green, attorney for plaintiff.

GEORGE NEUNER,
Attorney for Defendant.

And afterwards, to-wit, on the 8th day of April, 1929 there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

STIPULATION

IT IS HEREBY STIPULATED by and between B. A. Green, attorney for plaintiff, and Charles W. Erskine, Assistant United States Attorney for the District of Oregon, that the following may be stricken from plaintiff's complaint on file herein:

Paragraph III, Page 2, beginning on Line 5 and ending on Line 6, the following:

"and was informed by said defendant, through its physicians and surgeons."

Paragraph V, Page 2, beginning on Line 28 and ending on Line 30, the following:

"he was advised by said defendant that

he was permanently and totally disabled and that further payments on his converted policy need not be made."

Dated at Portland, Oregon, this 8th day of April, 1929.

B. A. GREEN,
Attorney for Plaintiff.
CHAS. W. ERSKINE,
Assistant United States Attorney.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 8, 1929
G. H. Marsh, Clerk
B

And afterwards, to-wit, on Monday, the 8th day of April, 1929, the same being the 27th judicial day of the regular March Term of said Court, present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

ORDER TO STRIKE

This matter coming on to be heard on the stipulation heretofore filed herein, the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the following be, and the same is hereby, stricken from the complaint on file herein:

From Paragraph III, Page 2, beginning on Line 5 and ending on Line 6, the following:

> "and was informed by said defendant, through its physicians and surgeons."

From Paragraph V, Page 2, beginning on Line 28 and ending on Line 30, the following:

> "He was advised by said defendant that he was permanently and totally disabled and that further payments on his converted policy need not be made."

Dated at Portland, Oregon, this 8th day of April, 1929.

JOHN H. McNARY,
District Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 8, 1929
G. H. Marsh, Clerk

And afterwards, to-wit, on the 8th day of April, 1929 there was duly filed in said Court, an Answer in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

ANSWER

COMES NOW the United States of America, by George Neuner, United States Attorney for the District of Oregon, and Chas. W. Erskine, Assistant United States Attorney, and for answer to plaintiff's complaint herein, admits, denies, and alleges as follows:

I.

Alleges that defendant has no knowledge or information sufficient to form a belief relative to the allegations contained in Paragraph I of plaintiff's complaint, and therefore denies the same.

II.

Admits each and every allegation contained in Paragraph II of plaintiff's complaint.

III.

Denies each and every allegation contained in

Paragraph III of plaintiff's complaint.

IV.

Denies each and every allegation contained in Paragraph IV of plaintiff's complaint, except that it is admitted that the plaintiff was permanently and totally disabled on the 8th day of July, 1927.

V.

Denies each and every allegation contained in Paragraph V of plaintiff's complaint.

VI.

Admits each and every allegation contained in Paragraph VI of plaintiff's complaint.

For a further and separate answer and defense to plaintiff's complaint, defendant alleges:

I.

That heretofore, and on the 16th day of November, 1917, plaintiff made application for and received a policy of war risk insurance in the sum of Ten Thousand ($10,000) Dollars, conditioned that the said defendant would pay to the plaintiff the sum of Fifty-Seven and 50/100 ($57.50) Dollars per month, should he become permanently and totally disabled as defined by law, that said policy lapsed for non-payment of premiums on the 1st day of September, 1919, and that thereafter, under date of February 16, 1927, said plain-

tiff applied for reinstatement and conversion of the full amount of his said lapsed war risk term insurance, and that said application was tentatively accepted by the Director of the United States Veterans Bureau and a five-year convertible policy of government life insurance was tentatively issued to plaintiff, effective March 1, 1927.

II.

That at the time plaintiff filed said application and at the time the same was tentatively accepted and granted, plaintiff was suffering from disability due to his military service, and was rated less than permanently and totally disabled, by the United States Veterans Bureau.

III.

That under the provisions of Section 304 of the World War Veterans Act, and regulations promulgated thereunder, plaintiff, to be entitled to reinstate or reinstate and convert his said war risk insurance, among other things, was required to submit proof satisfactory to the Director of the Veterans Bureau that he was not permanently and totally disabled.

IV.

That at the time plaintiff filed his said application, as aforesaid, and at the time the same was tentatively accepted and granted, the evidence

submitted to the Director of the Veterans Bureau by plaintiff and in the possession of said Director was insufficient to show to the satisfaction of said Director that plaintiff was not permanently and totally disabled; that plaintiff was therefore re-examined by the Veterans Bureau, and on the 9th day of July, 1927, was rated permanently and totally disabled as of July 8, 1927; that, as a result of said examination, it was subsequently, and on the 12th day of June, 1928, finally determined that the plaintiff was permanently and totally disabled from the 23rd day of February, 1926.

V.

That by reason of the fact that plaintiff was permanently and totally disabled at the time he filed his said application for reinstatement and conversion, as aforesaid, and at the time the same was tentatively accepted and a five-year convertible policy of government life insurance tentatively issued to him, plaintiff was not entitled either to reinstate or to convert his war risk insurance, and the action of the Veterans Bureau in tentatively reinstating said war risk insurance and tentatively issuing said policy was contrary to law, and void, and plaintiff had no war risk insurance or government life insurance in force and effect at any time subsequent to September 1, 1919.

VI.

That on the 23rd day of June, 1928, plaintiff was advised that the action of the Veterans Bureau in reinstating and converting said insurance was erroneous, contrary to law, and void, and that the same had been cancelled; that, upon cancelling the said reinstatement and conversion, the Veterans Bureau at a later date returned all the premiums tendered by plaintiff by reason of plaintiff's said reinstatement and conversion of his war risk insurance.

WHEREFORE, Defendant, having fully answered plaintiff's complaint, demands that plaintiff take nothing thereby and that defendant go hence without day and recover of and from plaintiff its costs and disbursements herein.

GEORGE NEUNER,
United States Attorney for the
District of Oregon.
CHAS. W. ERSKINE,
Assistant United States Attorney.

United States of America,
District of Oregon } ss.

I, Chas. W. Erskine, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I am

possessed of information regarding the above-named plaintiff, from which I have prepared the foregoing ANSWER, and that the allegations contained in said ANSWER are true, as I verily believe.

CHAS. W. ERSKINE.

Subscribed and sworn to before me this 6th day of April, 1929.

J. W. McCULLOCH,
Notary Public for Oregon.

(SEAL) My commission expires Dec. 23, 1930.

United States of America,
District of Oregon } ss.

Due and legal service of the within ANSWER is hereby admitted and accepted in the State and District of Oregon, this 6th day of April, 1929, by receiving a copy thereof, duly certified to be a true and correct copy of the original, by Chas. W. Erskine, Assistant United States Attorney.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 8, 1929
G. H. Marsh, Clerk

And afterwards, to-wit, on the 10th day of April, 1929, there was duly filed in said Court, a Demurrer in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

DEMURRER

COMES NOW the plaintiff and files this as a demurrer to the further and separate answer and defense of the defendant filed herein, on the ground and for the reason that the things and matters therein set forth do not constitute a defense to the cause of action as alleged in plaintiff's complaint.

B. A. GREEN,
Attorney for plaintiff.

Service accepted this 10th day of April, 1929.

J. W. McCULLOCH,

Of attorneys for defendant.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Apr. 10, 1929
G. H. Marsh, Clerk

And afterwards, to-wit, on Wednesday, the 17th day of April, 1929, the same being the 34th judicial day of the regular March Term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

ORDER

This cause having come on to be heard before the Hon. Robert S. Bean, Judge of the above entitled court, upon this, the 15th day of April, 1929, upon a demurrer as filed by the plaintiff to the answer of the defendant on the ground and for the reason that the same failed to state facts sufficient to constitute a defense to the cause of action alleged in plaintiff's complaint, plaintiff appearing in court at this time by his attorney, B. A. Green, and defendant appearing in court by Charles W. Erskine, Assistant United States Attorney, and the court being advised in the premises,

IT IS ORDERED AND ADJUDGED that said demurrer be and the same is hereby sustained,

and said defendant is given ten (10) days to further answer and plead herein.

AND IT IS SO ORDERED.

Dated this 17th day of April, 1929.

R. S. BEAN,
Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Apr. 17, 1929
G. H. Marsh, Clerk

And afterwards, to-wit, on the 8th day of May, 1929 there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

STIPULATION

IT IS HEREBY STIPULATED by and between Chas. W. Erskine, Assistant United States Attorney for the District of Oregon, who appears on behalf of the defendant, and B. A. Green, Attorney for the Plaintiff herein, that the above-entitled case may be tried and determined by the Court without

the intervention of a jury.

CHAS. W. ERSKINE,
Assistant United States Attorney
for the District of Oregon,
Attorney for Defendant.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed May 8, 1929
G. H. Marsh, Clerk
K

And afterwards, to-wit, on Wednesday, the 8th day of May, 1929, the same being the 51st judicial day of the regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

JUDGMENT

This cause coming on for trial before the Hon. Judge McNary, Judge of the above entitled Court,

upon the 8th day of May, 1929, being the day regularly set therefor, and said plaintiff and defendant having heretofore stipulated in writing, which stipulation was duly filed with the Clerk, that a jury be waived in said cause, and that the matter be heard before the court without the intervention of a jury, and the Court having heard the opening statement of the respective counsel, and having heard the testimony on behalf of the plaintiff, defendant waiving testimony to be produced, the Court does find and enter its verdict that plaintiff was on said 8th day of July, 1927, permanently and totally disabled, and that said re-instated and converted policy was, on said 8th day of July, 1927, in full force and effect:

THEREFORE, based upon said finding and said verdict;

IT IS ORDERED AND ADJUDGED that plaintiff do have and recover judgment against the defendant for the sum of $57.50 per month from July 8th, 1927, in all the sum of $1265.00, and that plaintiff receive such payments thereunder as made and provided by law, and the Court does find that $1000.00 is a reasonable sum to be allowed B. A. Green as attorney for plaintiff in said cause.

AND IT IS SO ORDERED.

Dated this 8th day of May, 1929.

JOHN H. McNARY,

Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed May 8, 1929
G. H. Marsh, Clerk
K

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Petition for Order of Appeal in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

PETITION FOR ORDER OF APPEAL

The above-named defendant, United States of America, conceiving itself aggrieved by the judgment filed and entered on the 8th day of May, 1929, in the above-entitled action does hereby appeal from said judgment and the whole thereof to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reason and upon the ground specified in the assignments of error

filed herewith and prays that this, its appeal, be allowed; that a citation issue as provided by law and that a transcript of the record and proceedings in said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit sitting at San Francisco, California.

Dated at Portland, Oregon, this 1st day of August, 1929.

GEORGE NEUNER,
United States Attorney for the
District of Oregon
FRANCIS E. MARSH,
Assistant United States Attorney.

United States of America,
District of Oregon } ss.

Due and legal service of the within PETITION FOR ORDER OF APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT

District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards to-wit on Friday the 2nd day of August, 1929, the same being the 24th judicial day of the regular July Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

ORDER ALLOWING APPEAL

UPON THE PETITION of the United States of America, defendant in the above-entitled cause, IT WAS ORDERED that the appeal of said defendant from the judgment herein to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed.

Dated at Portland, Oregon, this 2nd day of August, 1929.

JOHN H. McNARY,
Judge.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Notice of Appeal in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

NOTICE OF APPEAL

TO THE ABOVE-NAMED PLAINTIFF, KENNETH E. BANKS, and his Attorney, B. A. GREEN:

You and each of you will take notice that the defendant, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment and decree made and entered in the above-entitled cause and Court and signed by Honorable John H. McNary, one of the Judges of said District Court,

on the 8th day of May, 1929, which judgment and decree were and are to the effect that plaintiff herein, Kenneth E. Banks, became totally and permanently disabled on the 8th day of July, 1927, and ever since said date has been and now is permanently and totally disabled and that there is due and owing said Kenneth E. Banks on a policy of Converted Insurance carried by said plaintiff, a sum equal to the accrued payments of $57.50 per month from the 8th day of July, 1927, being in all the sum of $1265.00, and the defendant appeals from the whole of said judgment and decree.

Dated this 2nd day of August, A. D., 1929.

GEORGE NEUNER,
United States Attorney for the
District of Oregon.
FRANCIS E. MARSH,
Assistant United States Attorney.

United States of America, }
} ss.
District of Oregon }

Due and legal service of the within NOTICE OF APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of Aug. 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United

States Attorney for the District of Oregon.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, Assignments of Error in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

ASSIGNMENTS OF ERROR

The United States of America being the defendant in the above-entitled cause and appearing by George Neuner, United States Attorney for the District of Oregon, and Francis E. Marsh, Assistant United States Attorney, and having filed a Notice of Appeal as required by law, that the defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final

order and judgment made and entered in said cause against said defendant herein, now makes and files in support of said appeal the following assignments of error upon which it will rely for a reversal of said final order and judgment upon the said appeal, and which said error is to the great detriment, injury and prejudice of this defendant, and said defendant says that in the records and proceedings upon the hearing and determination thereof in the District Court of the United States for the District of Oregon, there is a manifest error in this, to-wit:

I.

That the Court erred in sustaining the demurrer of the plaintiff to the further and separate answer and defense contained in defendant's answer to plaintiff's complaint.

II.

That the Court erred in denying the admission of proof to substantiate the allegations contained in defendant's further and separate answer as appear in Exception Number I.

WHEREFORE, on account of the error above assigned, the defendant prays that the judgment of this Court be reversed and that this cause be remanded to the said District Court and that such directions be given that the above errors may be

corrected and law and justice be done in the matter.

Dated at Portland, Oregon, this 2nd day of August, 1929.

GEORGE NEUNER,
United States Attorney for the
District of Oregon.
FRANCIS E. MARSH,
Assistant United States Attorney.

United States of America, }
District of Oregon } ss.

Due and legal service of the within ASSIGNMENTS OF ERROR is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929 there was duly filed in said Court, a Bill of Exceptions in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

BILL OF EXCEPTIONS

BE IT REMEMBERED that the above-entitled case came on to be heard before the Honorable John H. McNary, Judge of the above-entitled Court, on the 8th day of May, 1929, without a jury and the plaintiff being represented by his attorney, B. A. Green, and the defendant by its attorney, Chas. W. Erskine, Assistant United States Attorney for the District of Oregon.

WHEREUPON, the following proceedings, among others were had:

MR. GREEN: Now may it please the Court, I want to make this statement for the record, and I understand that this will be agreed to by counsel for the Government. What counsel for the plaintiff and counsel for the defendant desire in this case

is that the record shall be in such shape that there shall be presented to the Circuit Court of Appeals only the questions as to the legality or the rightfulness of the rulings made by Judge Bean with respect to the demurrer. Is that right?

MR. ERSKINE: That is correct.

THE COURT: Then I should think that should be very easily arranged by stipulation.

MR. GREEN: And it is further agreed now that where the answer of the defendant in the case of Kenneth E. Banks vs. United States of America denies all of Paragraph III thereof, it is now stipulated that the last five lines of said paragraph III of plaintiff's complaint may be taken as admitted, these lines reading as follows: "And plaintiff made payment of the back premiums on his said policy with interest at five per cent per annum, as provided by law. That thereafter upon said application for reinstatement and conversion there was issued to plaintiff a $10,000.00 Five Year Convertible Term Policy." Is that so stipulated, Mr. Erskine? I read from my complaint, Paragraph III.

MR. ERSKINE: Yes, except that defendant desires to stipulate only that the policy was tentatively issued.

MR. GREEN: Plaintiff rests, Your Honor, with the stipulation in the record as it now stands.

MR. ERSKINE: At this time the defendant desires to offer proof to substantiate the allegations contained in its further and separate answer in this case.

THE COURT: One further and separate answer, is there?

MR. ERSKINE: Yes.

MR. GREEN: At this time, Your Honor, the plaintiff objects to the offer of proof as to any matter or thing contained in the first further and separate answer and defense, there being only one separate answer and defense, on the ground and for the reason that the evidence is wholly incompetent, irrelevant, and immaterial and not tending to prove or disprove any issue in this cause, and specifically upon the ground that heretofore and with respect to said further and separate answer and upon the same having been filed, a demurrer was

filed to said further and separate answer by the plaintiff herein, which demurrer was argued and authorities submitted to Judge Bean of this court and the demurrer was sustained, and thereafter an order was entered striking said further and separate answer from the files of this cause, upon the ground and for the reason that the same did not state facts sufficient to constitute a defense to the plaintiff's cause of action, and based upon said order and said ruling with respect to said demurrer there is no issue tendered by the pleadings in this cause that would warrant the Court in receiving any evidence in substantiation with respect to the offer of proof.

THE COURT: In view of the ruling of Judge Bean upon the demurrer I will sustain the objection.

MR. ERSKINE: And the Court will allow an exception?

THE COURT: An exception is taken and allowed.

IT IS HEREBY CERTIFIED that the foregoing proceedings were had upon the trial in this cause, and that the Bill of Exceptions contains all the evi-

dence relative to or necessary to an understanding of the foregoing objection and exception.

IT IS FURTHER CERTIFIED that the foregoing exception asked or taken by the defendant was allowed by the Court and this Bill of Exceptions was duly presented and filed within the time fixed by law and the orders of this Court and is by me duly allowed and signed this 2nd day of August, 1929.

JOHN H .McNARY,
One of the Judges of the District Court of the United States for the District of Oregon.

O. K.
B. A. GREEN,
Attorney for Plaintiff.
Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

STIPULATION

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled action that the record and transcript to be prepared by the Clerk of the Court and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit shall consist of the following:

Citation on Appeal
Complaint
Stipulation
Order to Strike
Answer
Demurrer
Order Sustaining Demurrer
Stipulation Waiving Jury
Judgment
Petition for Order of Appeal
Order Allowing Appeal
Notice of Appeal
Assignments of Error with Endorsements thereon
Bill of Exceptions with Endorsements thereon

This Stipulation

Praecipe for Record to be Prepared by Clerk

B. A. GREEN,
Attorney for Plaintiff

FRANCIS E. MARSH,
Assistant United States Attorney
for the District of Oregon

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
HSK

And afterwards, to-wit, on the 2d day of August, 1929, there was duly filed in said Court, a Praecipe in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

PRAECIPE

To the Clerk of the Above-Entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Ap-

peals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said appellate Court and especially including therein the following documents:

Citation on Appeal
Complaint
Stipulation
Order to Strike
Answer
Demurrer
Order Sustaining Demurrer
Stipulation Waiving Jury
Judgment
Petition for Order of Appeal
Order Allowing Appeal
Notice of Appeal
Assignments of Error with Endorsements thereon
Bill of Exceptions with Endorsements thereon
Stipulation
This Praecipe for Record to be prepared by Clerk

Dated at Portland, Oregon, this 2nd day of August, 1929.

FRANCIS E. MARSH,
Assistant United States Attorney

Endorsed:
U. S. DISTRICT COURT
District of Oregon
Filed Aug. 2, 1929
G. H. Marsh, Clerk
K

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

KENNETH E. BANKS, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

GEORGE NEUNER,
United States Attorney.
FRANCIS E. MARSH,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
General Counsel.
J. O'C. ROBERTS,
Assistant General Counsel.
JAMES T. BRADY,
Attorney, United States Veterans' Bureau.

In the United States Circuit Court of Appeals for the Ninth Circuit

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UNITED STATES OF AMERICA, APPELLANT

v.

KENNETH E. BANKS, APPELLEE

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF THE CASE

Kenneth E. Banks, plaintiff below and hereinafter called plaintiff, was granted $10,000 war risk term insurance while in the military service of the defendant. This insurance lapsed for nonpayment of the premium for the month of September, 1919. On February 16, 1927, the plaintiff applied to the United States Veterans' Bureau for reinstatement and conversion of this lapsed insurance in the full amount. The application was accepted and effective March 1, 1927, there issued to the plaintiff a five-year convertible term policy in the amount of $10,000. The plaintiff became permanently and totally disabled at least as early as July 8, 1927. None of the foregoing facts are in dispute. The United States Veterans' Bureau by action taken on

71879—29

July 9, 1927, rated the plaintiff permanently and totally disabled as of July 8, 1927, and on June 12, 1928, the Director of the United States Veterans' Bureau determined that permanent and total disability existed from and after the 23d day of February, 1926, which was a date prior to the application for and issuance of the convertible term policy. (Par. IV, further and separate answer, R. 16, 17.) On June 23, 1928, the plaintiff was advised that his policy had been cancelled and all premiums paid by plaintiff were returned to him. (Par. VI, further and separate answer, R. 18.)

The plaintiff filed a demurrer to the further and separate answer of the defendant on the ground that same did not constitute a defense to the complaint. (R. 20.) The demurrer was sustained by order entered April 17, 1929. (R. 22.) A jury was waived in writing. (R. 22.) The petition alleged (Par. IV, R. 9) and the answer admitted (Par. IV, R. 15) that plaintiff's condition upon July 8, 1927, was that of one permanently and totally disabled. At the trial counsel stipulated:

> that the record shall be in such shape that there shall be presented to the Circuit Court of Appeals only the questions as to the legality or the rightfulness of the rulings made by Judge Bean with respect to the demurrer.

Whereupon the plaintiff rested. (Bill of Exceptions, R. 34, 35.)

The defendant then offered to prove the allegations in its further and separate answer in sub-

stance to wit: That on July 9, 1927, the Veterans' Bureau rated the plaintiff permanently and totally disabled as of July 8, 1927; that on the 12th day of June, 1928, it was finally determined by the Director of the United States Veterans' Bureau that plaintiff was permanently and totally disabled from the 23d day of February, 1926; that on June 23, 1928, plaintiff was advised that the action of the Veterans' Bureau in reinstating and converting said insurance was erroneous, contrary to law and void; that the policy of converted insurance was cancelled; that the premiums tendered by plaintiff were returned to the plaintiff. (Bill of Exceptions, R. 35.)

To this offer of proof the plaintiff objected. (R. 35.) The objection was sustained (R. 36), and an exception taken by the defendant and noted by the Court (R. 36). Judgment for the plaintiff awarding installment of $57.50 per month from July 8, 1927, was filed May 8, 1929. From this judgment the defendant is here on appeal.

ASSIGNMENTS OF ERROR

I

That the Court erred in sustaining the demurrer of the plaintiff to the further and separate answer and defense contained in defendant's answer to plaintiff's complaint.

II

That the Court erred in denying the admission of proof to substantiate the allegations contained

in defendant's further and separate answer as appears in Exception Number I.

PERTINENT STATUTES AND REGULATIONS

That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. (Section 402 of the Act of October 6, 1917, 40 Stat. 409.)

Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. (Section 404 of the Act of October 6, 1917, 40 Stat. 410.)

This insurance is subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract. (Regulation, Bulletin No. 1, promulgated October 15, 1917.)

In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with, an application for reinstatement, in whole or in part, of lapsed or canceled

yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. (Section 304 of the World War Veterans' Act, 1924, as amended, 44 Stat. 799.)

Subject to the provisions of section 29 of the War Risk Insurance Act and amendments thereto policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums. (Section 411 of the War Risk Insurance Act as amended by the Act of August 9, 1921, 42 Stat. 157.)

All such policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums and subject to the provisions of section 23: *Provided,* That a letter mailed by the bureau to the insured at his last-known address informing him of the invalidity of his insur-

ance shall be deemed a contest within the meaning of this section: *Provided further,* That this section shall be deemed to be in effect as of April 6, 1917. (Section 411 of the War Risk Insurance Act as amended March 4, 1923, 42 Stat. 1527; now Section 307 of the World War Veterans' Act, 1924, 43 Stat. 627.)

ARGUMENT

The questions in this case are:

Did the happening of the contingency insured against within six months from date of issuance of the reinstated policy, and so found by the Veterans' Bureau within such six months, operate to suspend the incontestable clause provided in Section 307?

And if it did—

Did the finding of the Director on June 12, 1928 (more than six months subsequent to the reinstatement of the policy), that the plaintiff was permanently and totally disabled from February 23, 1926 (prior to the reinstatement of the policy), together with the fact that on June 23, 1928, plaintiff was advised of the cancellation of his policy and his premiums returned, as was alleged in the further and separate answer of the defendant, constitute a defense?

The answers to these questions turn on the interpretation of the language "has been in force," as found in Section 307, quoted herein at page 5,

and the sufficiency of the allegations of the defendant's further and separate answer. (R. 15–19.)

A restatement of the material admitted facts is:

March 1, 1927: Issuance of the reinstated policy.

July 8, 1927: Existence of permanent and total disability as determined by defendant and admitted by plaintiff.

June 12, 1928: A finding of permanent and total disability by the Director of the United States Veterans' Bureau, effective as of February 23, 1926.

June 23, 1928: Plaintiff notified of cancellation of policy and premiums returned to plaintiff.

Section 411 of the War Risk Insurance Act which was enacted on August 9, 1921 (42 Stat. 157), provided that the policy, with certain exceptions, became incontestable after six months *from date of issuance or reinstatement.*

When the Bureau came to apply this Section it was discovered that it was held in a large number of cases that provisions similar to Section 411 as it appeared in the Act of August 9, 1921, did not protect the Bureau unless the policy was contested in court within the six months' period after the issuance of the policy even when the insured had died in the meantime. On the other hand, it was found that the United States Circuit Court of Appeals in the case of the *Mutual Reserve Fund Life Association* v. *Austin,* 142 Fed. 398, 6 L. R. A., N. S. 1064, had indicated that insertion of the words "in continuous force" limited the application of the in-

contestable clause to the lifetime of the insured, and that the same views have also been indicated by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Insurance Co.,* 283 Ill. 136, L. R. A. 1918 D. 1196.

Thereupon the Bureau requested that Section 411 be amended, and on March 4, 1923, said Section 411 was amended (42 Stat. 1527) and made retroactive to April 6, 1917, and therein it was provided that the policy became incontestable "after the insurance *has been in force* six months from the date of issuance or reinstatement." With the passage of the World War Veterans' Act, 1924, said Section 411 was reenacted as Section 307 (43 Stat. 627), with the same incontestable clause as appeared in Section 411 of the War Risk Insurance Act, as amended by the Act of March 4, 1923, supra.

It is a well-recognized rule of statutory construction that where an amendment is enacted it must be presumed that the Legislature intended to make a change in the law as it stood previously, and the amendment should be so construed as to give effect to this intention. (Black on Interpretation of Law, Section 165.)

To ascertain the intention of Congress resort may be had to the Reports of the Committee in charge of the legislation. (*Duplex Printing Co.* v. *Emil J. Deering,* 254 U. S. 443.)

The Report of the Committee on Interstate and Foreign Commerce on the Bill which afterwards

became the Act of March 4, 1923, contains the following:

> Section 9 of the bill amends Section 411 of the present law so that a policy of insurance shall be incontestable after it has been in force six months, instead of providing that the policy shall be incontestable six months after date of issuance or reinstatement. Section 411 now provides that, subject to Section 29, a policy of insurance heretofore or hereafter issued in accordance with article 4 of the War Risk Insurance Act shall be incontestable after six months from date of issuance or date of reinstatement, except for fraud or nonpayment of premiums. The Bureau has found upon investigation that a large number of cases construing a similar proviso in insurance policies have held that the maturity of the policy did not stop the running of the statute, and that the statute could be stopped from running only by action brought in court to cancel the policy. In other words, if an insured paid one month's premium and no more and died or became permanently disabled within that month the Government would be bound to pay the policy (if the bureau followed these opinions) unless the Government, within six months from the date of issuance of the policy or reinstatement had begun a suit to cancel the policy. *The amendment, instead of providing that the policy shall be incontestable six months after date, provides that*

> *it shall be incontestable after the policy "has been in force six months." All the cases hold that where the provision in the policy is that it must be in force six months that the maturity of the policy stops the running of the statute and the insurer can contest.* (Congressional Record, Vol. 64, Part 5, pages 5195, 5196.)

The intent of Congress expressed in the foregoing Committee Report is clear and certain and it must follow that the phrase "has been in force" as it applies to the policy of insurance issued under the War Risk Insurance Act, or its amendments, *means this and just this: That if death or permanent and total disability of the insured happens within six months from the date of issuance of the policy the incontestable clause is suspended.*

If the plaintiff should urge that similar language in ordinary insurance contracts has been interpreted otherwise by the Courts—as admittedly is the fact—that is something with which we are not and can not here be concerned for *in this case we are not dealing with an ordinary contract of insurance,* but one commonly known as a war-risk insurance contract, one which by an unbroken line of decisions is held not controlled by state laws or decisions, and one issued subject to statutes and regulations then existent, or thereafter enacted or promulgated. (*Helmholz et al.* v. *Horst et al.,* 294 Fed. 417; *Sawyer* v. *United States,* 10 Fed. (2d) 416; *White* v. *United States,* 270 U. S. 175.)

Further, the United States Veterans' Bureau, the Department of the Government charged with the administration of war-risk insurance legislation, has from the beginning construed the language "has been in force" in conformity with the clearly expressed intent of Congress as is set out in the foregoing Committee Report.

In an opinion by the General Counsel of the United States Veterans' Bureau, rendered June 3, 1924, in the case of Otis L. Sutherland, it was stated: "The precedents of this office have consistently held that the insured must survive the six-months period prescribed by the statute in order for the incontestable clause to operate." (28 Opinions General Counsel 1440.)

> A settled construction by a Department of the Government of the laws of the United States will not be overturned by the courts unless clearly wrong. (*Illinois Surety Co.* v. *United States,* 249 U. S. 214; 60 L. Ed. 609.)

When Congress reenacted Section 307 of the World War Veterans' Act using the identical language of Section 411 of the War Risk Insurance Act, it knew, or was presumed to know, the construction which had been placed thereon by the Veterans' Bureau, and in reenacting the law without change Congress impliedly recognized and approved the Veterans' Bureau's construction of the phrase "has been in force" under the rule laid down

in the case of *United States* v. *Cerecedo Hermanos Y Compania,* 209 U. S. 337; 52 L. Ed. 821, which holds that:

> The reenactment by Congress, without change, of a statute which has previously received a long-continued executive construction, is an adoption by Congress of such construction.

Recalling, then, that as is provided in Section 304 of the World War Veterans' Act, which is quoted in this brief at page 5, it is the Director of the Veterans' Bureau who determines whether or not insurance shall be reinstated; that the defendant in its further and separate answer alleged and then offered to prove that the Director had determined this plaintiff to have become permanently and totally disabled prior to the issuance of this insurance; that the plaintiff admitted that he became permanently and totally disabled within six months from the date of the issuance of the policy and that the Bureau had so rated him; that thereafter the Bureau had notified the plaintiff of its action in cancelling the policy; that the defendant returned the premiums to the plaintiff; and that *this contract provided that the operation of the incontestable clause was suspended if the contingency insured against happened within six months from date of issuance,* it must follow that the Trial Court erred in sustaining plaintiff's demurrer to the defendant's further and separate answer.

It is respectfully submitted that the judgment of the Trial Court should be reversed.

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U. S. GOVERNMENT PRINTING OFFICE: 1929

No. 5923

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

KENNETH E. BANKS, Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEE, KENNETH E. BANKS

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

KENNETH E. BANKS, Appellee.

BRIEF OF APPELLEE, KENNETH E. BANKS

STATEMENT OF THE CASE

The facts in this case are not in dispute. Kenneth Banks while with the military forces of the United States was granted a ten thousand dollar war risk term insurance policy. This insurance lapsed for non-payment of the premium for the month of September, 1919. Upon February 16, 1927, plaintiff applied to the United States Veterans Bureau for reinstatement and conversion of this lapsed insurance in the full amount. The World War Veterans Act of June 7, 1924, provides that in the event all provisions other than the requirements as to physical condition of the applicant are made, an application for reinstatement may be approved, provided the applicant's disability, if any, is the result of an injury or disease or an aggravation thereof suffered or contracted in the military or naval service during the World War, provided the applicant during his lifetime submits satisfactory evidence to the director showing the service origin thereof, **and that the applicant is not totally and permanently disabled.**

This provision of the Veterans Act became a part of every reinstated application and policy. It is important to bear this in mind, because the law specifically provides that the applicant during his lifetime must submit satisfactory evidence to the director that he is not permanently and totally disabled at the time of the application. Therefore, **we must assume that this portion of the law was complied with before the acceptance of the application.** In other words, here is a positive and affirmative finding as to this man's condition, to-wit, that he was not permanently and totally disabled upon March 1, 1927. The policy was issued to this plaintiff, the premiums were paid thereon to and including the month of August, 1927. This of itself means an acceptance of the premiums for a period of six months which carries the policy beyond the contestable clause. The Regional office of the Veterans Bureau at Portland, Oregon, rated the man on July 9, 1927, permanently and totally disabled as of July 8, 1927. Upon **June 12, 1928,** the director of the Veterans Bureau reviewed the Regional findings and rated this man permanently and totally disabled as of the 23rd day of February, 1926. **The plaintiff below was not advised of this fact until June 12, 1928,** or more than six months after the previous rating of July 8, 1927. On June 23, 1928, the director attempted to cancel the policy.

The appellant or defendant below set forth these facts in the answer. The plaintiff filed a demurrer to this answer, and the same was sustained by order of the court. The offer of proof made by the appellant and the facts pertaining thereto are clearly set forth in the statement of facts as given by the

appellant. Judgment was entered for the plaintiff in the sum of $57.50 per month from July 8, 1927. This judgment was filed May 8, 1929.

ARGUMENT

The court must bear in mind that before a policy could be reinstated proof must be made to the director that the man **was not permanently and totally disabled. This Banks did during the month of February, 1927.** No fraud or deceit is or can be alleged or claimed.

The case has a practical common sense viewpoint. The law permitted reinstatement prior to July 1, 1927, upon application and proof that the man was not permanently and totally disabled, and upon payment of certain back premiums. Banks complied with the law. The act is to be liberally construed in favor of the veterans (Jagodnigg vs. United States, 295 Federal 916. United States vs. Cox, 24 Federal 2, 944. United States vs. Eliasson, 20 Federal 2, 821). He paid his premiums. He was called for examination in July, 1927. He was examined and a permanent and total disability rating given him by the Portland Regional office. Then more than six months elapse and he is told by the director that his rating of total and permanent disability had been made retroactive to February 23, 1926, and therefore he was not entitled to reinstate his policy.

As a practical matter, all of these boys are solely under the control of the Veterans' Bureau. They are subject to Government ratings except upon contest upon the insurance contract. Their treatments

are received from the Government doctors, and the Government doctors in a case such as this attend a man when sleeping and waking—as he walks, as he talks, and as he eats. His every action is subject to the minutest control. The failure to report for examination or failure to accept treatments is subject to punishment. The law permitted reinstatement. The boys were urged time after time to reinstate. A definite program of propaganda was carried on for months to secure by the Government the very things these boys did. It was a process of salesmanship. This man, without reinstatement, had the opportunity to show a permanent and total disability rating from date of discharge. In the place of filing his contest, as hundreds of others have done, upon his original policy of War Risk Insurance, he followed the advice of the defendant and reinstated, paid his money and secured his contract. The defendant now attempts to destroy this policy. The Government surely blows hot and blows cold. Upon March 1, 1927, it said: "You are not permanently and totally disabled." Upon June 12, 1928, it said: "You were permanently and totally disabled February 23, 1926, and ever since said date have been and always will be." Which is true? Even this great Government must have and maintain some little harmony of action.

THE LAW IN THIS CASE

The cases cited by the appellant on pages 10 and 11 of the brief do not show that War Risk Insurance is of a different nature than other insurance, except that it possesses somewhat more liberal features. These liberal features in favor of the men do not extend to the right of the Government to carry on in the manner in which they carried on in the Banks case. The difference between this Government insurance and the old line insurance comes from the fact that Government insurance is presumed to be without profit. This element of profit, or the carrying charge, being absorbed by the people of this nation in recognition of the service rendered by these men. Otherwise, its features are the same. Banks could not by virtue of his reinstatement sue upon his original policy of War Risk Insurance (Allen vs. the United States, 33 Fed. (2nd) 888). If the Government is right he now cannot sue upon this reinstated policy, because they contend he never had such a policy. In other words, the Government, by blowing hot and cold, caused him to reinstate so that he could not sue on his policy of War Risk Insurance, and, second, carried him as to his War Risk Insurance beyond the statute of limitations, and, third, after the happening of these two contingencies, cancelled his reinstated policy and thereafter he is denied relief from any and every angle. Law is presumed to be the rule of reason. Reason does not appear herein.

Appellant lays great stress upon the words "has been in force" and the meaning of these words. This policy was in force until the notice of contest—that

is, the letter of June 14, 1928. True, the policy matured upon the rating of permanent and total disability of August 8, 1927, but the man paid his premium even for the month of August, 1927. The maturity of the policy did not void the policy, and the element of contest did not enter into this case until long subsequent to the six months period provided in the contract. We are unable to follow the appellant's reasoning and cannot but conclude that the policy remained in full force and effect without the element of contest being present until June 12, 1928. **Every affirmative act appearing in this record was the act of the Government.**

Appellant lays great stress upon the fact that Congress by the amendment of an act must have had in mind the rulings of the department which administered this law. It is also a rule of law too well settled for argument that Congress in the amendment of any law is presumed to have in mind the rulings of the United States Supreme Court with respect to the law and the questions involved. The rulings of the Supreme Court are of more force and effect and are paramount to the settled policies of the administrative head of any department of the Government.

The issues are clearly drawn. Either the statement of Honorable Robert S. Bean, district judge in Jensen vs. the United States, 29 Federal 2d, 951, is correct or it is not correct. There can be no middle ground. We feel that it would be futile for us to attempt to improve upon the statement given in this case. We quote a portion of this opinion:

"The position of the Government is that the permanent and total disability of the plaintiff within the six months' period matured the policy and it was not thereafter "in force," and therefore the incontestable provisions of the law had no application, and such seems to be the ruling of the Comptroller General, Philip McNish (7 Decisions Comptroller 551). But I am unable to distinguish this case from Mutual Life Ins. Co. v. Packing Co., 263 U. S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102, and Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A.) 294 F. 886, holding that the death of an insured does not stop the running of the incontestable provision of a life policy, for the reason that it does not terminate the contract of insurance, which upon the death of the insured immediately inures to the benefit of the beneficiary.

"So here the fact that the insured became totally and permanently disabled within the six months' period did not terminate the insurance. The insurance was payable in 240 equal monthly payments. Section 512, 38 U. S. C. A. The permanent and total disability of the insured merely fixes the date when the monthly payments should commence. The contract itself continues in force until the plaintiff has received the full benefit thereof unless his disability ceases in the meantime. If the government should refuse at any time to make such payments and the plaintiff elects to bring action to recover the same, he would necessarily be compelled to rely on the contract of insurance as a basis for his action. It is suggested that since war risk insurance differs from commercial life insurance, in that it is an insurance against both death and total disability, and may be reinstated at a time when the insured is suffering from service con-

nected temporary total disability, the rule applicable to commercial insurance is not controlling, in the constructions of section 307 of the World Veterans' Act. But war risk insurance is not a gratuity but a contract between the insured and the government, and the rights of the parties are to be ascertained from the terms of their contract. St. Bank & Trust Co. v. U. S. (C. C. A.) 16 F. (2d) 439. The provisions of section 307 are, I take it, to be construed and determined by the applicable rules to similar provisions in any other contract of insurance."

We submit the judgment should be sustained.

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